Petition

81-415

No.

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In the Supreme Court of the United States

October Term, 1981

THE CASBAH, INC., *et al.*,
Petitioners,

vs.

CHARLES THONE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For the Eighth Circuit

DAVID C. WEINER, *Counsel of Record*
FRED P. SCHWARTZ
ARMOND D. BUDISH
HAHN, LOESER, FREEDHEIM, DEAN & WELLMAN
800 National City E. 6th Building
Cleveland, Ohio 44114
(216) 621-0150
Counsel for Petitioners

Of Counsel:
DONALD B. FIEDLER
300 Keeline Building
Omaha, Nebraska 68102

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

1. Whether the Eighth Circuit usurped the function of the Nebraska legislature by substantially revising a state law.

2. Whether the Nebraska law is vague and overbroad and invites discriminatory enforcement in violation of the Fourteenth Amendment to the Constitution.

3. Whether the Nebraska law fails to satisfy basic principles of due process by improperly creating permissive inferences and/or permissive presumptions.

4. Whether the Nebraska law is an unreasonable regulation in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

5. Whether the prohibition on advertising in the Nebraska law impermissibly penalizes speech protected by the First Amendment to the Constitution.

LIST OF ALL PARTIES

Petitioners herein, Appellants in Case Number 80-1925 and Appellees in Case Number 80-2033 below, are The Casbah, Inc., The Disc Counter, Inc., Jeff Ferber, d/b/a H & D Sales, Greg Hasselhorst, d/b/a Euphoria, Eric Listou, d/b/a Joint Venture Novelty Snop, Pipe Dream Inc., and Dennis Robinson, d/b/a The Joynt (hereinafter collectively referred to as the "Merchants" or "Appellants"). Respondents herein, Appellees in Case Number 80-1925 and Appellants in Case Number 80-2033 below, are Charles Thone, Governor for the State of Nebraska, Paul Douglas, Attorney General for the State of Nebraska, Elmer Kohmepsher, Colonel in Charge of the Nebraska State Patrol, and Donald L. Knowles, County Attorney for Douglas County, Nebraska (hereinafter collectively referred to as "the State" or "Nebraska").

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Section 620.04 2

The Merchants' petition for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Eighth Circuit, which judgment upheld in its entirety a law of the State of Nebraska which had enacted the "Model Drug Paraphernalia Act" drafted by the Drug Enforcement Agency of the federal government. The Nebraska law seeks to make it a criminal offense to possess, use, manufacture, disseminate or advertise so-called "drug paraphernalia." The Eighth Circuit erred in failing to declare the Nebraska law unconstitutional.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit has not been officially reported. The opinion is in Appendix A (App. 1).

The opinion of the United States District Court for the District of Nebraska has not been officially reported. The opinion is in Appendix B (App. A24).

JURISDICTION

The Court of Appeals for the Eighth Circuit ("Eighth Circuit") filed its judgment on June 8, 1981. On July 9, 1981, the Eighth Circuit denied the Merchants' Petition for Rehearing *En Banc*. The Eighth Circuit granted the Merchants' Motion for Stay of the Mandate on July 30, 1981.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."

2. The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

3. Legislative Bill 991, 1980 Neb. Laws, codified at Neb. Rev. Stat. §§ 28-101, 28-431, and 28-439 to 28-444 (Supp. 1980), is set forth in Appendix C (App. A53).

4. City of Parma, Ohio Ordinance No. 242-79, codified at §§ 620.01 and 620.04 of the Codified Ordinances of the City of Parma; City of Lakewood, Ohio Ordinance No. 5-80, codified at §§ 513.01 and 513.04 of the Codified Ordinances of the City of Lakewood; and City of North Olmsted, Ohio Ordinance No. 80-28, codified at §§ 513.01 and 513.04 of the City of North Olmsted Codified Ordinances are set forth consecutively in Appendices D-F (App. A63).

5. The Model Drug Paraphernalia Act is set forth in Appendix G (App. A98).

STATEMENT OF THE CASE

A. Prior Proceedings.

The Merchants display, sell, and advertise recorded and taped music, magazines, jewelry, T-shirts, smoking accessories, and a variety of novelty items. On April 23, 1980, the Merchants filed an action in the United States District Court for the District of Nebraska ("District Court") against the State of Nebraska and several of its officials (hereinafter collectively referred to as the "State"). The Merchants challenged the constitutionality of Legislative Bill 991, 1980 Neb. Laws ("Nebraska Law"),

seeking declaratory and injunctive relief pursuant to 28 U.S.C. §§ 1331, 1343, 2201 and 2202, and 42 U.S.C. §§ 1983, 1985, and 1988.

On April 23, 1980 the District Court entered an order temporarily restraining the enforcement of the Nebraska Law. On September 26, 1980, following an evidentiary hearing, the District Court rendered an opinion in *The Casbah, Inc. v. Charles Thone,* No. 80-0-271 (D. Neb. Sept. 26, 1980) (App. at A24). The District Court found central portions of the Nebraska Law in violation of the Constitution. However, rather than strike down the Nebraska Law, the District Court severed certain phrases and substantially altered the plain meaning or scope of other language.

The Merchants and the State cross-appealed to the United States Court of Appeals for the Eighth Circuit on October 16, 1980, the Eighth Circuit stayed the judgment of the District Court pending determination of the appeals, and on June 8, 1981, it affirmed in part and reversed in part the judgment of the District Court (App. at A1). On July 9, 1981, the Eighth Circuit denied the Merchants' Petition for Rehearing *En Banc.* On July 30, 1981, the Eighth Circuit granted the Merchants' Motion for Stay of the Mandate.

B. The Nebraska Law.

The Nebraska Law was based upon, and is virtually identical to, the Model Drug Paraphernalia Act drafted by the Drug Enforcement Agency of the Department of Justice ("Model Act").[1] The Nebraska Law and the Model

1. *The Casbah, Inc. v. Thone,* Nos. 80-1925 & 80-2033, slip op. at 4 & n.4 (8th Cir. June 8, 1981) (hereinafter cited as "Slip Op.").

Act prohibit the possession,[2] use,[3] delivery,[4] manufacture[5] and advertisement[6] of "drug paraphernalia." "Drug paraphernalia" is defined in both the Nebraska Law and the Model Act as any item "used, intended for use, or designed for use" in drug-related activities.[7] Listed in the Nebraska Law and the Model Act are legislatively designated examples of "drug paraphernalia"[8] and factors which law enforcement officers, judges and juries are instructed to consider in determining whether particular items are illicit "drug paraphernalia."[9]

The Nebraska Law and Model Act impose criminal[10] and civil forfeiture[11] penalties for the possession, use, sale, dissemination, manufacture or advertisement of so-called "drug paraphernalia." An individual violating the Nebraska Law for the first time by selling an item deemed to be "drug paraphernalia" is subject to a jail sentence of up to six (6) months or a fine of up to one thousand dollars ($1,000) or both. If a person delivers "drug para-

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2. Nebraska Law Section 3 (App. at A56); Model Act Article II, Section (A) (App. at A103).

3. Nebraska Law Section 3 (App. at A56); Model Act Article II, Section (A) (App. at A103).

4. Nebraska Law Section 4 (App. at A56); Model Act Article II, Section (B) (App. at A104).

5. Nebraska Law Section 4 (App. at A56); Model Act Article II, Section (B) (App. at A104).

6. Nebraska Law Section 6 (App. at A57); Model Act Article II, Section (D) (App. at A104).

7. Nebraska Law Section 1 (App. at A53); Model Act Article I (App. at A99).

8. Nebraska Law Section 1(4)(a)-(m) (App at A54-55); Model Act Article I (App. at A101-102).

9. Nebraska Law Section 2 (App. at A55-56); Model Act Article I (App. at A102-103).

10. Nebraska Law Section 4(2) (App. at A56); Model Act Article II, Section (B) (App. at A103-104).

11. Nebraska Law Section 7 (App. at 57-58); Model Act Article III (App. at A105).

phernalia" to a juvenile, that person is subject to a jail sentence of up to one (1) year or a fine of up to one thousand dollars ($1,000) or both.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT OF THE EIGHTH CIRCUIT DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER COURTS DECLARING UNCONSTITUTIONAL AND STRIKING DOWN LAWS BASED UPON THE MODEL DRUG PARAPHERNALIA ACT.

The judgment of the Eighth Circuit is in direct conflict with a number of recent decisions of federal and state courts which have declared unconstitutional and struck down laws based upon the Model Act. Most important, the decision of the Eighth Circuit is in stark conflict with the opinion of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") in *Record Revolution No. 6, Inc. v. City of Parma, Ohio,* 638 F.2d 916 (6th Cir. 1980), *vacated and remanded only as to Case Nos. 80-3308 and 80-3352,* 49 U.S.L.W. 3882 (May 26, 1981).[12]

Both the Eighth and Sixth Circuits were presented with constitutional challenges to laws virtually identical

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12. The third consolidated case decided by the Sixth Circuit, *The Right Place, Inc. v. City of North Olmsted, Ohio,* No. 80-3353, was not appealed to the Supreme Court. Accordingly, the Sixth Circuit's opinion in *Record Revolution No. 6, Inc.,* became final in that case and stands as the law governing the Sixth Circuit. The decision of the Sixth Circuit in consolidated cases *Record Revolution No. 6, Inc. v. City of Parma, Ohio,* No. 80-3308, and *Alexander J. Luka d/b/a Daystar Boutique v. City of Lakewood, Ohio,* No. 80-3352, was vacated and remanded for consideration of a single issue of state law which arose following entry of the judgment of the Sixth Circuit. *See* 49 U.S.L.W. 3882 (May 26, 1981).

to each other and to the Model Act. *Record Revolution*, 638 F.2d at 919[13]; App. at 4 & n.4.

The Sixth Circuit found a number of constitutional defects in the Ohio Ordinances and, therefore, permanently enjoined their enforcement. The Eighth Circuit, explicitly rejecting the analysis of the Sixth Circuit, upheld the constitutionality of the Nebraska Law in its entirety.

The opinions of the Sixth and Eighth Circuits present at least five significant areas of direct conflict. The first direct conflict between the Sixth and Eighth Circuits involves the analysis of the definition of "drug paraphernalia." In particular, the Sixth Circuit determined that defining "drug paraphernalia" as items "designed for use" in drug-related activities fails to give any " 'hint to those attempting to comply with [the statute] what is included in the definition,' " *Record Revolution*, 638 F.2d at 930 (*quoting Indiana Chapter, NORML, Inc. v. Sendak*),[14] and creates a serious "danger of arbitrary and discriminatory enforcement" in violation of the Constitution. *Record Revolution*, 638 F.2d at 931. The Eighth Circuit, on the other hand, expressly rejected the holding of the Sixth Circuit and, after revising the language, found the same statutory definition of "drug paraphernalia" to pass constitutional muster. App. at A11-13.

The Ohio Ordinances and the Nebraska Law make it a crime to deliver, possess with intent to deliver, manufacture, or manufacture with intent to deliver drug para-

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13. The municipal ordinances challenged before the Sixth Circuit were City of Parma Ordinance No. 242-79, amended by No. 103-80; City of Lakewood Ordinance No. 5-80; and City of North Olmsted Ordinance No. 80-28 (hereinafter collectively referred to as the "Ohio Ordinances"). The Ohio Ordinances are reprinted at Appendices D-F, at A63-A97.

14. No. TH 75-142-C (S.D. Ind. Feb. 4, 1980), *vacated as moot at time of appeal*, No. 80-1305 (7th Cir. July 22, 1980).

phernalia, "knowing, or under circumstances where one reasonably should know", that it will be used with controlled substances. *Record Revolution,* 638 F.2d at 934; App. at A56. Focusing upon the "reasonably should know" language, the Sixth Circuit found this offense provision vague and overbroad in violation of due process standards. *Record Revolution,* 638 F.2d at 935-36. This same offense provision was effectively excised from the Nebraska Law by the Eighth Circuit and thereafter upheld against constitutional attack. App. at A16-17.

The third area of direct conflict between the decisions of the Sixth and Eighth Circuits concerns the list of factors which law enforcement officers, judges and juries are instructed to consider in determining the guilt of an individual. The Sixth Circuit found that those factors permit the "potential arrest, prosecution, or conviction of a person on the impermissible theory of guilt by association." *Record Revolution,* 638 F.2d at 933. The Eighth Circuit again rejected the opinion of the Sixth Circuit, instead holding that "the enumerated factors themselves pose no constitutional problem, and are valuable guides in determining what items are prohibited." App. at A14.

Another significant conflict between the Sixth and Eighth Circuit opinions involves the prohibition of advertising which promotes, in whole or in part, the use or sale of "drug paraphernalia". Both courts applied the analysis recently set forth by this Court in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York,* 447 U.S. 557 (1980), but with differing results. The Sixth Circuit struck down the provision finding that the Ohio Ordinances banned speech protected by the First Amendment to the Constitution and that the reach of the Ohio Ordinances was more extensive than necessary to serve the regulatory interest of the Ohio municipalities. *Record*

Revolution, 638 F.2d at 936-37. The Eighth Circuit, after "construing" the advertising proscription, found that the Nebraska Law only prohibited advertisements solely promoting illegal activity and therefore upheld the Nebraska Law. App. at A20-23.[15]

Finally, the Sixth Circuit refused to substantially revise the Ohio Ordinances in an attempt to remedy their constitutional defects, holding that federal courts are not permitted to usurp the states' and municipalities' legislative function. *Record Revolution*, 638 F.2d at 926-27. The Eighth Circuit, while recognizing that "a federal court must take a state statute as written and cannot find the statute constitutional by remedying the defects which render it imprecise", App. at A8, nonetheless judicially redrafted the Nebraska Law and then found the redrafted law to be constitutional.

The decision of the Eighth Circuit is also in direct conflict with a number of other federal and state courts. Since the Sixth Circuit rendered its well-reasoned judgment, *every* court, except the Eighth Circuit, presented with a challenge to a "drug paraphernalia" law based upon the Model Act has followed the precedent of the Sixth Circuit in striking down the law. *E.g., Information Management Services, Inc. v. Borough of Pleasant Hills*, 512 F. Supp. 1066 (W.D. Pa. 1981); *General Stores, Inc. v. City of Albuquerque*, No. 81-0027-M (D.N.M. March 23, 1981); *Weiler v. Carpenter*, 507 F. Supp. 837 (D.N.M. 1981); *Lazy, J., Ltd. v. The Borough of State College*, No. 80-1167 (M.D. Pa. Jan. 30, 1981); *Back Door Records v. City of Jacksonville*, No. LR-C-80-314 (E.D. Ark. Jan.

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15. The Eighth Circuit decision conflicts not only with the Sixth Circuit decision but also with the opinion of this Court in *Bigelow v. Virginia*, 421 U.S. 809 (1975), which involved circumstances very similar to those involved herein. See discussion at pages 24-29, *infra*.

8, 1981); *Gaffey v. Babb*, 50 Or. App. 617, 624 P.2d 616 (Ct. App. Or. 1981); *The Town Tobacconist v. Degnan*, No. C-2198-80 (Super. Ct. Ch. N.J. March 12, 1981).[16]

II. THE QUESTIONS PRESENTED ARE OF SUBSTANTIAL IMPORTANCE, THE RESOLUTION OF WHICH WILL HAVE NATIONWIDE IMPACT.

The Model Act, virtually identical to the Nebraska Law was drafted by the Drug Enforcement Agency of the Department of Justice and a large number of states and municipalities throughout the country have adopted laws based upon it. As stated in the Brief of Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, Texas, Utah, and Washington as *Amici Curiae*, filed in *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., prob. juris. noted*, 49 U.S.L.W. 3893 (No. 80-1681 June 1, 1981) ("States' Brief"), at least twenty-one states and numerous localities have enacted laws based upon the Model Act. States' Brief at 2-3 & n.1. Moreover, many other governmental units have considered enacting laws based upon the Model Act and have refrained from so doing because in their considered opinion the Model Act is unconstitutional and/or pending the

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16. *Florida Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956, 959 (5th Cir. 1981) stayed enforcement of a municipal ordinance based upon the Model Act pending appeal. The Court of Appeals for the Fifth Circuit noted that the appellants, asserting that the municipal ordinance was unconstitutional, had demonstrated a "substantial likelihood of success on the merits." *Id.*

It should also be noted that *Hejira Corp. v. MacFarlane*, No. 80-2062 (10th Cir. May 5, 1981), upheld a Colorado law against constitutional attack. The Colorado law, while bearing some resemblance to portions of the Model Act, significantly differs in material respects from the Model Act. *See* App. at A23 n.20 at 22.

ultimate resolution by this Court of the issues presented herein. A resolution of the conflict between the Sixth and Eighth Circuits regarding the constitutionality of laws based upon the Model Act will have a substantial impact upon merchants in states and municipalities across the nation.

This Court apparently has recognized the importance of issues presented by statutes and ordinances banning "drug paraphernalia" by noting probable jurisdiction in *The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, Illinois,* 639 F.2d 373 (7th Cir. 1981), *prob. juris. noted,* 49 U.S.L.W. 3893 (No. 80-1681 June 1, 1981). The instant action is equally or more appropriate for consideration by this Court than is *Village of Hoffman Estates.* The States' Brief in *Village of Hoffman Estates* confirms that, of the various legislative formulations banning or regulating "drug paraphernalia," the Model Act is by far the most frequently adopted of such laws. *See* States' Brief at 3-5. *Village of Hoffman Estates,* however, has at issue a sui generis formulation unlike the Model Act in almost every particular save one portion of the definition of "drug paraphernalia."[17] 639 F.2d 373, 376. Therefore, a decision in *Village of Hoffman Estates* cannot resolve all of the important constitutional issues presented herein concerning laws based upon the Model Act since they are simply not presented by the language of the ordinance at issue in that case. Accordingly, this Court should grant the Merchants' Petition for Certiorari and consider or consolidate this action with the *Village of Hoffman Estates.*

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17. Village of Hoffman Estates Ordinance No. 969-1978 includes the phrase "designed for use" with illegal drugs. As did the Sixth Circuit, the Seventh Circuit Court of Appeals found that phrase unconstitutionally vague. 639 F.2d at 386.

III. THE DECISION OF THE EIGHTH CIRCUIT IS CLEARLY IN ERROR AND SHOULD BE REVERSED.

A. The Eighth Circuit Improperly Usurped the Function of the Nebraska Legislature by Substantially Revising the Nebraska Law in an Attempt to Remedy Its Constitutional Defects.

The Eighth Circuit improperly usurped the legislative function by substantially rewriting the Nebraska Law. That federal courts lack the power to construe state statutes or municipal ordinances is well-described in the opinion of the Sixth Circuit:

> [A] federal court must take the state statute or municipal ordinance as written and cannot find the statute or ordinance constitutional on the basis of a limiting construction supplied by it rather than a state court. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). As stated in *Hynes v. Mayor and Council of the Borough of Oradell*, 425 U.S. 610, 622 (1976), "[e]ven assuming that a more explicit limiting interpretation of the ordinance could remedy the flaws we have pointed out . . . we are without power to remedy the defects by giving the ordinance constitutionally precise content." *See also Smith v. Goguen*, 415 U.S. 566, 575 (1974); *Gooding v. Wilson*, 405 U.S. 518, 520 (1972).

Record Revolution, 638 F.2d at 926 (footnote and parallel citations omitted).[18]

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18. The lack of judicial power to rewrite laws in order to uphold their constitutionality also applies to federal courts presented with challenges to federal laws, *see Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964), and to state courts confronted with challenges to state laws, *see, e.g., State v. Shreveport News Agency, Inc.*, 287 So. 2d 464, 469-70 (La. 1973) (court will not construe state law to make it constitutional under federal constitu-

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The Eighth Circuit recognized the federal courts' lack of power to rewrite state legislation. App at A8-9. Yet, under the guise of "extrapolating allowable meaning," the Eighth Circuit substantially revised the Nebraska Law[19] in an attempt to remedy the law's constitutional defects.[20]

In particular, the Eighth Circuit exceeded its powers primarily by:

(1) Revising the definition of "drug paraphernalia" so as constructively to add the bracketed terms:

> "Drug paraphernalia" means all items which are used, intended [by the defendant] for use [by another], or [intentionally] designed [by the defendant] for use [by another] in drug-related activities.

App. at A11-13.

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tional dictates); *State v. Wedelstedt*, 213 N.W.2d 652, 656 (Iowa 1973) (same); *Mackenzie v. State*, 76 Ohio St. 369, 374, 81 N.E. 638 (1907) (court cannot, by forced construction, modify or amend a state statute).

19. The Eighth Circuit relied on *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972), for the proposition that a federal court may "extrapolate" the meaning of a state or municipal law so as to uphold its constitutionality. App. at A9. However, the Court in *Grayned* distinguished between "extrapolation" and "construction":

> "Extrapolation," of course, is a delicate task, for it is not within our power to *construe* and *narrow* state laws.

408 U.S. at 110 (emphasis added). The Court in *Grayned* did not add, delete or narrow any statutory terms, as opposed to the actions taken by the Eighth Circuit herein which did all three to a substantial degree.

20. The Eighth Circuit correctly stated that state courts could not construe the Nebraska Law so as to "significantly alter the federal constitutional issues". App. at A6-7 n.6. That is a major reason why the Eighth Circuit properly held that abstention is inappropriate in this case. *Id.* Among the courts which have been presented with constitutional challenges to laws regulating "drug paraphernalia", only one abstained, and its decision was reversed by the Court of Appeals for the Fifth Circuit. *High Ol' Times, Inc. v. Busbee*, 621 F.2d 135 (5th Cir. 1980).

(2) Amending the offense provision by rendering meaningless the italicized language:

> It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, *or under circumstances where one reasonably should know,* that it will be used with a controlled substance.

App. at A15-16.

(3) Deleting the italicized language from the advertising prohibition:

> It shall be unlawful for any person to place any advertisement, the purpose of which, *in whole or in part,* is to promote the sale of drug paraphernalia.

App. at A22-23.

The foregoing examples demonstrate the substantial judicial legislation undertaken by the Eighth Circuit in an attempt to change the entire import of the Nebraska Law. This Court should not condone such rewriting of state legislation by federal courts. For the reasons discussed above, the Eighth Circuit exceeded the scope of its powers by substantially revising the Nebraska Law.

B. The Definition of "Drug Paraphernalia" Is Vague and Overbroad and, in Conjunction With the Offense Provisions, Fails to Provide Adequate Notice and Enforcement Guidelines in Violation of the Fourteenth Amendment to the Constitution.

The definition of "drug paraphernalia" in the Nebraska Law fails to meet the due process standards of the Four-

teenth Amendment to the Constitution in two respects: (1) the definition of "drug paraphernalia" is vague and overbroad, and (2) in conjunction with the offense provisions, the definition of "drug paraphernalia" fails to provide adequate notice and enforcement guidelines to law enforcement officers, judges and juries.

1. The definition of "drug paraphernalia" in the Nebraska Law is unconstitutionally vague and overbroad in violation of due process standards.

The Sixth Circuit succinctly set forth the well-settled dictates of due process:

> The void-for-vagueness doctrine commands any statute to give persons of common intelligence fair notice of the persons covered and the conduct proscribed. *Colautti v. Franklin*, 439 U.S. 379, 390-91 (1979). Fundamental fairness, as well as a proper regard for preventing the deterrence of constitutionally protected conduct, requires that persons not be compelled to guess at their own peril the meaning and application of a statute. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Ascertainable standards of guilt are imperative in order to protect against arbitrary, erratic, and discriminatory arrests, prosecutions and convictions. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Winters v. New York*, 333 U.S. 507, 515 (1948). Unless the statute itself prescribes sufficiently precise standards, basic policy decisions are impermissibly delegated to the personal predilections of the police, prosecutors and juries. *Smith v. Goguen*, 415 U.S. at 575 (1974); *Grayned v. City of Rockford*, 408 U.S. at 108. "Legislators may not so abdicate their responsibilities for setting the standards of the criminal law." 415 U.S. at 575.

Record Revolution, 638 F.2d at 927 (parallel cites omitted). *Accord*, App. at A10-11 & n.8.

The Nebraska Law defines "drug paraphernalia" as any item which is "used, intended for use, or designed for use" in drug-related activities. This definition is so overly inclusive as potentially to include virtually any innocent item. Therefore, the Nebraska Law fails to give proper notice of illicit items and permits innocent persons to be arrested, prosecuted and convicted on the basis of an act or state of mind of another person.

The unrebutted evidence introduced in the District Court established that practically any everyday item can be and has been used in drug-related activities. "[T]he only limit on what can be used to introduce a controlled substance into the body is imagination." App. at A34. *Accord*, *Record Revolution*, 638 F.2d at 930-31.

Defining "drug paraphernalia" in terms of the "design" of items is impermissible due to the lack of any design characteristics that distinguish items with lawful uses from items with unlawful uses. *Record Revolution*, 638 F.2d at 930-31; *The Casbah, Inc.*, District Court, App. at A34-35. The court in *Indiana Chapter, NORML, Inc. v. Sendak*, slip op. at 12-14, in an opinion relied upon and quoted by the Sixth Circuit, *Record Revolution*, 638 F.2d at 930, held that a definition of "drug paraphernalia" relying upon design characteristics is unconstitutionally vague:

> The term "designed" could signify only devices that have no use or function other than as a means to ingest a controlled substance. Alternatively, "designed" could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term "designed" could sweep into the definition of paraphernalia any device that could be

> altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition "designed for drug use" gives no hint to those attempting to comply with [the statute] what is included in the definition.[21]

Accord, The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 639 F.2d at 380-81, 386 & n.32; *Weiler v. Carpenter*, 507 F. Supp. 837, 843 (D.N.M. Feb. 11, 1981); *Lazy, J., Ltd. v. Borough of State College*, No. 80-1167, slip op. at 4-7 (M.D. Pa. Jan. 30, 1981); *Back Door Records v. City of Jacksonville*, No. LR-C-80-314, slip op. at 4-5 (E.D. Ark. Jan. 8, 1981); *Gaffey v. Babb*, 50 Or. App. 617, 624 P.2d 616, 622 (Ct. App. Or. 1981).

The definition of "drug paraphernalia" as items "used" or "intended for use" in drug-related activities also violates due process by failing to give fair notice to those subject to its strictures:

> The statute includes in its definition of paraphernalia instruments "used" and "intended for use." This means that a person could be deemed a dealer in paraphernalia because the buyer of his product intends to use the item to administer drugs. . . . A maker of pipes, spoons, or hand mirrors could be found to be

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21. The Sixth Circuit recognized that the term "designed" is not limited to items solely designed to be "drug paraphernalia":

> The comments to the Model Act indicate that the ordinances would apply to items which are not solely designed to be drug paraphernalia. App. 1237. Vagueness enters in our case once the ordinances begin to define drug paraphernalia in terms of the primary adaption or dominant purpose of the design. Then the definition begins to depend upon the ingenuity or purpose of the purchaser rather than the seller and upon the current practices of the clandenstine society or drug users. *Geiger v. City of Egan*, 618 F.2d 26 (8th Cir. 1980); *Music Stop, Inc. v. City of Ferndale*, 488 F. Supp. 390 (E.D. Mich. 1980).

Record Revolution, 638 F.2d at 930.

in violation of the statute because his legitimate products are bought by a middleman who intends to advertise and sell the product as drug devices or who sells them simply as pipes or spoons but to someone who later uses the items to ingest drugs. Thus, someone can be considered to be dealing in paraphernalia because of the intent of someone once, twice, or even several times removed. The same problem of lack of notice faces a seller who may sell items such as pipes or spoons or paper clips to someone who intends to use the items for the ingestion of drugs rather than for their legitimate functions.

Indiana Chapter, NORML, Inc. v. Sendak, slip op. at 16-17. *Accord, General Stores, Inc. v. City of Albuquerque*, No. 81-0027-M, slip op. at 4-5 (D.N.M. March 23, 1981); *Weiler v. Carpenter*, 507 F. Supp. 837, 842 (D.N.M. 1981); *Gaffey v. Babb*, 50 Or. App. 617, 624 P.2d 616, 623-24 (Ct. App. Or. 1981); *The Town Tobacconist v. Degnan*, No. C-2198-80, slip op. at 7-8 (Super. Ct. Ch. N.J. March 12, 1981).[22]

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22. The court in *The Town Tobacconist*, slip op. at 7-8, clearly described the constitutional defects in the phrases "used" and "intended for use":

> Objects are not used or intended for use in an unpopulated vacuum. The use or intention for use envisioned by the statute must be by someone. It is not facially clear whether "used" means frequently used or used by someone in particular against whom enforcement may be aimed and whether "intended for use" means intended by its manufacturer, its seller or its ultimate possessor for use. . . .
>
> It is not the seller's intent that is at issue. If it were, then an item would not be drug paraphernalia unless the retailer intended that his customer use it unlawfully. It is plain that the retailer's intent is to sell the item. . . .
>
> . . .
>
> The phrase "used or intended for use", that appears a dozen times renders the definition of drug paraphernalia unlawfully vague. It is impossible for any retailer to know whose use or whose intention he must be aware of. If it is "frequent" use, he can not tell how frequent it must be, or

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For these reasons, the definition of "drug paraphernalia" is vague and overbroad in violation of the Fourteenth Amendment to the Constitution. Therefore, the Eighth Circuit erred in concluding that the definition of "drug paraphernalia" in the Nebraska Law passes constitutional muster.[23]

2. The definition of "drug paraphernalia," in conjunction with the offense provisions, fails to provide adequate notice and enforcement guidelines in violation of the Fourteenth Amendment.

The offense provisions of the Nebraska Law violate due process by setting a negligence standard which requires a seller of virtually any item to guess, at his peril, at the intended or actual use to be made of an item by another individual. A wrong guess may be criminally punished. Therefore, the Nebraska Law violates due process.

The Nebraska Law makes it a criminal violation for a person to sell virtually any item "knowing, *or under circumstances where one reasonably should know*," that it will be used by another person for drug-related activities. All that is necessary under the Nebraska Law for

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Footnote continued—

among what groups of people. If it is the customer's intention, then, before the customer arrives, the retailer cannot tell if he is unlawfully stocking drug paraphernalia. The prior act of putting the item on his shelves would become unlawful only later, after the intentions of the yet unidentified customer are revealed.

23. The vagueness inherent in the definition of drug paraphernalia makes the Nebraska Law a highly efficient *in terrorem* mechanism to silence protected speech. Application of the "factors" contained in Section 2 of the Nebraska Law such as "statements" and "display" would implicate and unconstitutionally silence Merchants engaging in protected expression assailing marijuana laws or advocating counter-cultural lifestyles. *See, e.g.,*

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a law enforcement officer to arrest a vendor is probable cause to believe that some imaginary "reasonable seller" *should have known* in the circumstances that the purchaser would use the item for drug-related activity at some time in the future. Similarly, a judge or jury is permitted under the Nebraska Law to convict a seller on a finding that a hypothetical "reasonable seller" should have known that the buyer would use the item with a controlled substance. The offense sections provide no requirement that a vendor have any criminal intent or guilty knowledge. "Because most uses of the outlawed items are lawful and common, the 'reason to know' standard is too open-ended and too susceptible to misapplication to satisfy the dictates of due process." *Record Revolution,* 638 F.2d at 935-36 (footnotes omitted). *Accord, Weiler v. Carpenter,* 507 F. Supp. at 841.

For the reasons discussed above, the definition of "drug paraphernalia," in conjunction with the offense provisions, violates due process.[24] The Eighth Circuit erred in failing to so hold.[25]

Footnote continued—

Spence v. Washington, 413 U.S. 405 (1974); *Tinker v. Des Moines School District,* 393 U.S. 503 (1969).

Furthermore, heightened precision is required when a law impinges on first amendment values. *E.g., Hynes v. Mayor and Council of the Borough of Oradell,* 425 U.S. 610, 620 (1976). The Nebraska Law fails utterly to accord with that requirement.

24. The District Court recognized the constitutional defects in the negligence standard. *The Casbah, Inc.,* District Court, App. at A41-42. However, rather than strike down the Nebraska Law, the District Court severed the "reasonably should know" language from the law. *Id.* at 43. The Eighth Circuit reversed this portion of the District Court's judgment, preferring to construe this provision so as effectively to have no meaning apart from the definition of "drug paraphernalia." App. at A15-A17.

25. The attempted reading of an intent element into the definition of "drug paraphernalia" by the Eighth Circuit, even if permitted, does not cure the unconstitutional vagueness of the law. First, if that reading is upheld it creates a constitutionally

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C. The Eighth Circuit Erred in Failing to Hold That the Nebraska Law Created Permissive Inferences in Violation of Due Process Standards.

The Eighth Circuit erred in upholding against a due process challenge the list of various factors which law enforcement officers, judges and juries are instructed to

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offensive inconsistency with another part of the law. The definition and offense sections of the Nebraska Law set forth separate elements. The negligence standard in the offense sections is distinct from, and contrary to, the implication of an intent requirement into the definition section. As the District Court stated:

> Under the reasonably should know standard a conviction can be had without a showing of general criminal intent; that is, without establishing that the defendant specifically intended to violate the statute. As a result, the reasonably should know standard violates the prophylactic effect of the scienter requirement in the definition of drug paraphernalia. The statute cannot constitutionally take away with one hand what it gives with another.

The Casbah, Inc., District Court, App. at A41-42. *Accord, Record Revolution*, 638 F.2d at 934-36.

Second, even if the definition and offense sections are deemed to set forth a single element, as the Eighth Circuit suggests, *see* Slip. Op. at 17-18, rather than two separate elements, that too fails to cure the unconstitutional vagueness of the Nebraska Law. *Screws v. United States*, 325 U.S. 91 (1945), relied upon by courts considering the constitutionality of "drug paraphernalia" laws, identifies further constitutional defects in the Nebraska law.

Screws upheld the constitutionality of 18 U.S.C. § 52, now codified at 18 U.S.C. § 242, which makes it a crime to "willfully subject" an individual to a deprivation of constitutional or legal rights, privileges, or immunities. Discussing whether intent will cure an otherwise vague enactment, this Court stated:

> [T]he presence of a bad purpose or evil intent alone may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right *made definite by decision or other rule of law* saves the Act from any charge of unconstitutionality on the grounds of vagueness.

Id. at 103 (emphasis added).

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consider in determining the guilt of an individual.[26] Most of those factors permit the "potential arrest prosecution, or conviction of a person on the impermissible theory of guilt by association." *Record Revolution*, 638 F.2d at 933. *See* App. at A15. Therefore, those factors create permissive inferences in violation of due process standards. There is not a sufficient connection between proof of those factors and the guilt of the accused so as to satisfy requirements of due process. *E.g., General Stores, Inc. v. City of Albuquerque*, slip op. at 5-6, 7; *Weiler v. Carpenter*, 507 F. Supp. at 843-44; *Lazy, J., Ltd. v. Borough of State College*, slip op. at 8-9.

> A permissive inference:
>
> allows—but does not require—the trier of fact to infer the elemental fact [*i.e.*, sale or possession of 'drug paraphernalia'] from proof by the prosecutor of the basic one [*i.e.*, sale or possession of an item listed in the Nebraska Law as a common item of 'drug paraphernalia'] and that places no burden of any kind on the defendant.

County Court of Ulster County v. Allen, 442 U.S. 140, 157 (1979) (bracketed language added). *Accord, Hammontree v. Phelps*, 605 F.2d 1371, 1374-75 (5th Cir. 1979).

Footnote continued—

Unlike the law upheld in *Screws*, implication of an intent element into the Nebraska Law, even as revised by the Eighth Circuit, fails to cure its fatal vagueness. Contrast 18 U.S.C. § 52, which made it a crime to willfully violate a *definite* federal right, with the Nebraska Law, which makes it a crime to intentionally sell an otherwise innocent item. The former provides law enforcement personnel, judges and juries with guidelines to recognize a statutory violation (*i.e.*, violation of a definite federal right), while the latter does not (*i.e.*, sale of any item). Therefore, the substantial revision by the Eighth Circuit, even were it within its powers, fails to cure the Nebraska Law of its constitutional defects. *Accord, Lazy, J., Ltd. v. Borough of State College*, No. 80-1167, slip op. at 7-8 (M.D. Pa. Jan. 30, 1981).

26. Nebraska Law Section 2 (App. at A55-56).

A permissive inference violates due process unless it can be said with "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 442 U.S. at 165-66 & n.28. *See also Barnes v. United States*, 412 U.S. 837, 842, 843 (1973); *Leary v. United States*, 395 U.S. 6, 33 (1969); *McInerney v. Berman*, 473 F. Supp. 187, 188 (D. Mass. 1979), *aff'd*, 621 F.2d 20 (1st Cir.), *cert. denied*, 101 S. Ct. 201 (1980).

The listing of circumstantial factors in the Nebraska law creates permissive inferences in violation of due process:

> The factors include the proximity in time and space to a direct violation of the drug laws or to the presence of controlled substances, the statements of others, and the advertising of others. Thus, a retailer, for example, to avoid arrest, prosecution, or conviction, must continuously police the national and local media and the activities and statements of persons in the area of his store. The retailer could be safe from arrest on Monday morning when no one congregated near his store or the local narcotics dealer was on the other side of town, yet be very susceptible to arrest Monday afternoon when, unknown to the retailer, the narcotics dealer arrived around the corner from his store, attracting a group of persons who bought marijuana or other controlled substances and then came into his retail store to buy rolling papers, alligator clips, or pipes. In short, the ordinances permit events beyond the control of the retail owner to determine his guilt. . . . It is well established that guilt must be based on personal action, statements, or knowledge, not on association with other persons suspected of criminal conduct. *Sawyer v. Sandstrom*, 615 F.2d 211, 316-17 (5th Cir. 1980).

Record Revolution, 638 F.2d at 933 (footnote omitted.)[27] The Nebraska Law also permits, for example, the guilt of a vendor to be inferred from proof that a high percentage of the vendor's sales are pipes or alligator clips[28] or from proof that the vendor had been convicted many years earlier of possession of marijuana.[29] Moreover, the Nebraska Law permits a vendor to be arrested if not deemed by law enforcement officers to be a "legitimate" business.[30]

It cannot be said with substantial assurance that a vendor is selling items which will be used with controlled substances merely from proof of the various factors discussed above. Therefore, it is clear that the permissive inferences created by the list of circumstantial factors in the Nebraska Law violate due process standards. The Eighth Circuit erred[31] in holding otherwise.[32]

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27. Finding that Ohio law incorporates principles of due process, the Sixth Circuit declined to hold the list of circumstantial factors violative of the federal constitution. 638 F.2d at 933-34.

28. Nebraska Law Section 2(12) (App. at A56).

29. Nebraska Law Section 2(2) (App. at A55).

30. Nebraska Law Section 2(11) (App. at A56).

31. The Eighth Circuit misconceives the "prosecutorial scheme" of the Nebraska Law, stating that, "If third party actions as referred to in Section 2, tend to indicate that an item is drug paraphernalia, the focus of inquiry must necessarily shift to the intent of the individual involved." App. at A15. However, the language of the Nebraska Law clearly states that it *is* the factors in Section 2 which "a court or other authority *shall* consider" in determining whether an object is "drug paraphernalia," *i.e.*, used, intended for use, or designed for use in drug-related activity. App. at A55-56. (Emphasis supplied) There is no shift, or two-tiered intent determination in the Nebraska Law, which the Eighth Circuit found necessary to convict the individual.

32. The Nebraska Law lists in Section 1(4)(a)-(m), items deemed to be "common forms of drug paraphernalia." *Record Revolution,* 638 F.2d at 932. *Accord,* App. at A13 n.10. That listing also creates permissive inferences in violation of due process standards by allowing law enforcement officers, judges and juries to infer guilt from possession, sale or manufacture of an item listed therein.

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D. The Eighth Circuit Erred in Not Finding the Nebraska Law an Unreasonable Regulation Calculated to Stifle and Interfere With Legitimate Commercial Relations in Violation of Constitutional Due Process.

The Eighth Circuit erred in failing to find the Nebraska Law to be an unreasonable regulation calculated to destroy the Merchants' businesses in violation of the due process clause of the Fourteenth Amendment. *See Pierce v. Society of Sisters*, 268 U.S. 510, 535-36 (1924); *Meyer v. Nebraska*, 262 U.S. 390 (1922).

This Court has recently reemphasized that a state may not enact arbitrary or unreasonable laws simply because the activities aimed at involve "mundane commercial transaction[s]." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977). *See also Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976); and *Bigelow v. Virginia*, 421 U.S. 809 (1975).

However, legitimate the state's alleged purpose in regulating private activity—use of controlled substances here —that purpose cannot reasonably be achieved by suppressing the sale of neutral items of commerce. Constitutional concepts of "liberty" and "property" are not so narrow[33] that the state may destroy a legitimate business,

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Footnote continued—

Because there are no design characteristics of objects which distinguish objects intended for lawful use from objects intended for unlawful use, "the object by itself does not provide any basis for an inference of its intended use." *Record Revolution*, 638 F.2d at 933. Therefore, the permissive inferences created by listing in the Nebraska Law common forms of "drug paraphernalia" clearly violate due process. *See County Court of Ulster County, supra.*

33. As this Court found, in *Moore v. City of East Cleveland*:

"Due process has not been reduced to any formula; its content cannot be determined by reference to any code. . . .

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Pierce, 268 U.S. at 535-36, or impose a complete disability to pursue an occupation. *Board of Regents v. Roth*, 408 U.S. 564, 573-74 (1972); *accord*, *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967).

Under the Nebraska Law, since innocent items become "drug paraphernalia" only if an illicit intent is attached to the item, there is nothing that distinguishes a sale of drug paraphernalia from a sale of any other merchandise except an element wholly in the mind of the buyer or seller. District Court Op. at 7-8, 10, 14. The police officer's speculation about this incorporeal element—unaided by any objective factor consistent with guilt—will determine whether a shop owner's business is padlocked,[34] and the owner is hauled before a magistrate.

To be safe from the ruin of their businesses and their own incarceration, the Merchants would simply have to

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Footnote continued—

> It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . ."

431 U.S. 494, 538-39 (1977) citing Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961).

34. Section 7 of the Act contains a forfeiture penalty for items defined as drug paraphernalia which the Eighth Circuit upheld based on *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Slip. Op. at 20. Unlike the direct act of transporting contraband in *Calero-Toledo*, the Nebraska Law proscribes an act which is in itself *legal*—sale, manufacture, delivery or use of certain items—but which becomes illegal by virtue of a third party's actions.

Further, this Court in *Calero-Toledo* made it quite clear that seizure and forfeiture had to be "directly necessary to secure an important governmental or general public interest" 416 U.S. at 678. The Nebraska Law would only indirectly accomplish Nebraska's aim of stemming drug abuse, if at all. *Id.* Here, unlike *Calero-Toledo*, there is no special need for very prompt action. Rather, the Merchant's inventory is merely sitting on shelves awaiting purchase. Finally, this Court insisted there must be clear standards under a narrowly drawn statute, *id.*, which the Nebraska Law simply does not provide.

shut down. By confronting the Merchants with these consequences, the Nebraska Law exceeds permissible bounds for regulating private activity and chills the legitimate relationship of merchant and customer. This Nebraska Law which mandates an unreasonable and arbitrary inhibition on neutral activity violates constitutional due process.

E. The Eighth Circuit Erred in Failing to Hold That the Nebraska Law Impermissibly Penalizes Speech Protected by the First Amendment to the Constitution.

The Nebraska Law prohibits advertising which promotes, in whole or in part, the use or sale of "drug paraphernalia."[35] The Eighth Circuit erred in holding that the bar on advertising withstands constitutional challenge[36] under the First Amendment.[37]

The applicable analysis was set forth by this Court in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980):

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

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35. Nebraska Law Section 6 (App. at A57).

36. For the reasons discussed above, the prohibition on advertising is also vague and overbroad for its use of the term "drug paraphernalia" and the "reasonably should know" criterion. *See Record Revolution*, 638 F.2d at 937 n.32.

37. App. at A20.

The advertising banned by the Nebraska Law does not concern only unlawful activity. The Sixth Circuit, analyzing an identical provision in the Ohio Ordinances, stated:

> The ordinances, as now drafted, could infringe on protected speech in at least three different ways. First, the ordinances could be enforced against advertisers or publishers who place advertisements in printed media that circulates in other cities as well as Parma, Lakewood, and North Olmsted. Second, the ordinances could prevent the residents of these three cities from receiving information about the availability of items, defined by the ordinances as drug paraphernalia, in other cities that do not prohibit the use, sale or manufacture of those items. *Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1975). Third, the ordinances use of the words "promote in part" may allow the ban of speech discussing the reform of drug laws or speech glorifying the drug culture.

Record Revolution, 638 F.2d at 936-37 (citation omitted). Therefore, the Sixth Circuit concluded that the Ohio Ordinances did unconstitutionally penalize protected speech. *Record Revolution*, 638 F.2d at 937.

The Nebraska Law, similarly, infringes on protected speech by flatly barring all advertisements which have as one purpose (of many potential lawful purposes) the promotion of the sale of "drug paraphernalia." By use of the words "promote in part," the Nebraska Law casts a net so widely that it places a ban on speech containing factual matters of public interest.

Bigelow v. Virginia, 421 U.S. 809 (1975), which involved circumstances similar to those involved herein, struck down a Virginia statute which prohibited advertisements encouraging or promoting abortions, which are com-

mercial transactions, because the advertisements there prohibited contained "factual matter of clear 'public interest.' "[38] Since the scope of the proscription of the Nebraska Law is not limited to advertisements with the sole purpose of promoting commercial transactions, that law is also invalid under the First Amendment. *Accord, Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York,* 447 U.S. at 564-65; *New York Times v. Sullivan,* 376 U.S. 254 (1964).

The ban of the Nebraska Law is also "geographically overbroad," reaching advertisements promoting the sale of "drug paraphernalia" in areas beyond the geographic boundaries of Nebraska, many of which legally permit the sale of items which Nebraska officials might consider to be "drug paraphernalia." Again, the decision of this Court in *Bigelow* controls the instant action:

> The Virginia Legislature could not have regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that state. . . . Neither could Virginia prevent its residents from traveling to New York to obtain those services or, as the state conceded, . . . prosecute them for going there . . . .

421 U.S. at 822-24 (footnote omitted). The prohibition of the Nebraska Law is as fatally broad in geographic scope as the Virginia statute declared unconstitutional in *Bigelow. See Record Revolution,* 638 F.2d at 937.[39]

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38. 421 U.S. at 822.

39. The Eighth Circuit, while noting that "there may be merit to the geographical overbreadth argument," App. at A23 n.19, improperly refused to decide this issue, holding that proper parties were not before the Court. The Nebraska Law would infringe not only the First Amendment rights of out-of-state merchants, but also the rights of Nebraska "advertisers or pub-

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Application of the remaining factors set forth by the Court in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York* necessarily results in a conclusion that the Nebraska Law violates the First Amendment right of free speech. The suppression of protected speech worked by the Nebraska Law is more extensive than necessary to further any legitimate interest of the State. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 564-66. *See Record Revolution*, 638 F.2d at 937. Accordingly, the Eighth Circuit erred in upholding the constitutionality of the prohibition on advertising in the Nebraska Law.

Footnote continued—

lishers who place advertisements in printed media that circulates" in states other than Nebraska, *see Record Revolution*, 638 F.2d at 937, and the rights of residents of Nebraska interested in "receiving information about the availability of items, defined by the [Nebraska law] as drug paraphernalia, in other [states] that do not prohibit the use, sale or manufacture of these items." *Id. See, e.g.* Trial Transcript 43-45, 47-49, 60, 69-73, 75, 93-95, 133, 135, 142-143, 173-176, 187, 214, 270.

The Eighth Circuit also incorrectly held that the Merchants failed to raise this issue on appeal. App. at A23 n.19. The Merchants first raised and briefed the geographical overbreadth argument in the District Court, *see, e.g.*, Plaintiffs' Pre-Trial Brief at 14-17, and the District Court dealt with that issue in its opinion. *See The Casbah, Inc.*, District Court, App. at A45-46 & n.20. The Merchants incorporated their prior arguments by reference into their Appellate Brief at 7 and 26. Regardless of whether or not the issue was briefed in the Eighth Circuit, this Court should consider the geographical overbreadth argument. Public policy and this Court's decisions oblige and allow consideration of important questions of law even if not fully briefed and argued below. *See Blonder-Tongue Labs, Inc. v. Univ. of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971). The Nebraska Civil Liberties Union, which was granted permission to file a brief *amicus curiae* by the Eighth Circuit, fully briefed the geographical overbreadth issue. The Merchants again raised the geographical overbreadth issue in their Brief in Support of the Petition for a New Hearing before the Eighth Circuit, at pages 12-13.

The Merchants, some of whom conduct a multi-state business, some of whom advertise, and all of whom are interested in reading statements in the press concerning the availability in other states of items which may be banned in Nebraska, *see, e.g.*, Trial Transcript at 43-45, 47-49, 60, 69-73, 75, 93-95, 133, 135, 142-43, 173-76, 187, 214, 270, may properly raise the geographical overbreadth issue before this Court.

CONCLUSION

The judgment of the Eighth Circuit directly conflicts with the decisions of other courts declaring unconstitutional and striking down laws, virtually identical to the Nebraska Law, based upon the Model Drug Paraphernalia Act. The questions presented herein are of substantial importance, the resolution of which will have nationwide impact. Moreover, the opinion of the Eighth Circuit is plainly in error. For these reasons, this Court should grant the Merchants' Petition for Certiorari.

Respectfully submitted,

DAVID C. WEINER, *Counsel of Record*
FRED P. SCHWARTZ
ARMOND D. BUDISH
HAHN, LOESER, FREEDHEIM, DEAN & WELLMAN
800 National City E. 6th Building
Cleveland, Ohio 44114
(216) 621-0150
Counsel for Petitioners

Of Counsel:
DONALD B. FIEDLER
300 Keeline Building
Omaha, Nebraska 68102

APPENDIX A

Opinion of the United States Court of Appeals For the Eighth Circuit

(Filed June 8, 1981)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1925

THE CASBAH, INC.; THE DISC COUNTER, INC.; AND JEFF FERBER, D/B/A H & D SALES; GREG HASSELHORST, D/B/A EUPHORIA; ERIC LISTOU, D/B/A JOINT VENTURE NOVELTY SHOP, PIPE DREAM, INC.; DENNIS ROBINSON, D/B/A THE JOYNT,
Appellants,

v.

CHARLES THONE, GOVERNOR FOR THE STATE OF NEBRASKA; PAUL DOUGLAS, ATTORNEY GENERAL FOR THE STATE OF NEBRASKA; ELMER KOHMEPSHER, COLONEL IN CHARGE OF THE NEBRASKA STATE PATROL; DONALD L. KNOWLES, COUNTY ATTORNEY FOR DOUGLAS COUNTY, NEBRASKA
Appellees.

No. 80-2033

THE CASBAH, INC.; THE DISC COUNTER, INC.; AND JEFF FERBER, D/B/A H & D SALES; GREG HASSELHORST, D/B/A EUPHORIA; ERIC LISTOU, D/B/A JOINT VENTURE NOVELTY SHOP, PIPE DREAM, INC.; DENNIS ROBINSON, D/B/A THE JOYNT,
Appellees,

v.

CHARLES THONE, GOVERNOR FOR THE STATE OF NEBRASKA; PAUL DOUGLAS, ATTORNEY GENERAL FOR THE STATE OF NEBRASKA; ELMER KOHMEPSHER, COLONEL IN CHARGE OF THE NEBRASKA STATE PATROL; DONALD L. KNOWLES, COUNTY ATTORNEY FOR DOUGLAS COUNTY, NEBRASKA

Appellants.

Appeals from the United States District Court for the District of Nebraska.

Before HENLEY, *Circuit Judge*, BENNETT,* *Court of Claims Judge*, and MCMILLIAN, *Circuit Judge*.

HENLEY, *Circuit Judge*.

This action is before the court on an appeal and cross-appeal involving the constitutionality of a recently enacted Nebraska statute, Legislative Bill 991, 1980 Neb. Laws ("LB 991"),[1] which prohibits the use, sale and manufacture of "drug paraphernalia." Plaintiffs, appellants here, are wholesale distributors and retail merchants. Defendants, appellees here, include Charles Thone, the Governor of Nebraska; Paul Douglas, Attorney General for the State of Nebraska; Elmer Kohmetscher (alternately identified as Elmer Kohmepsher) of the Nebraska State Patrol; and Donald L. Knowles, County Attorney for Douglas County, Nebraska.

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*Marion T. Bennett, Judge, United States Court of Claims, sitting by designation.

1. Legislative Bill 991 was enacted April 23, 1980 and became effective April 24, 1980. The statute is codified at Neb. Rev. Stat. §§ 28-101, 28-431, and 28-439 to 28-444. (Supp. 1980).

The district court[2] sustained the constitutionality of the statute after severing certain phrases and construing the meaning of other language. With due respect for the district court's thoughtful opinion, we reverse those portions of the court's ruling severing phrases as unconstitutional and hold LB 991 constitutional as against the challenges we are called upon to consider and determine.

I

A. Proceedings Below.

Appellants on April 23, 1980 filed their action in district court, seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201, 2202 on the grounds that LB 991 abridges fundamental constitutional rights protected by the first, fourth, fifth and fourteenth amendments to the United States Constitution. Pursuant to an agreement of counsel, the district court on the same date entered an order temporarily restraining the enforcement of LB 991 pending a final determination on the merits. On September 4, 1980 the court held a consolidated hearing on the application for preliminary and permanent injunctions, with the result that by lengthy memorandum filed September 26, 1980 the court found the statute constitutional as construed. Pursuant to this memorandum of opinion, the court's temporary restraining order was dissolved. This court granted appellants' application for stay of judgment pending appeal.

B. LB 991.

LB 991 is based on the Model Drug Paraphernalia Act (Model Act) drafted by the Drug Enforcement Administration (DEA) of the United States Department of Justice.

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2. The Honorable Richard E. Robinson, United States Senior District Judge for the District of Nebraska.

In a Prefatory Note to the Model Act, the DEA acknowledged that the Model Act was drafted with the aim of overcoming constitutional infirmities that have rendered other drug paraphernalia laws subject to constitutional attack.[3] In the present appeal, we are essentially asked to decide whether this effort has been successful.[4]

The structure of LB 991 is somewhat complex and deserves summary here. Sections 1 and 2 are definitional. In Section 1, drug paraphernalia is defined as "all equipment, products, and materials of any kind which are used, intended for use, or designed for use" in manufacturing or ingesting controlled substances. A lengthy list of examples follows, with each example restating the requirement that the named object be "used, intended for use, or designed for use" in drug-related activities. The list of examples concludes with the catchall category of "objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body," followed by another list of thirteen exemplary items such as pipes of various types, miniature cocaine spoons, and roach clips. Although

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3. *See, e.g.*, statutes which have been held unconstitutional in *Geiger v. City of Eagan*, 618 F.2d 26 (8th Cir. 1980); *Record Head Corp. v. Sachen*, 498 F.Supp. 88 (E.D. Wis. 1980); *Magnani v. City of Ames, Ia.*, 493 F.Supp. 1003 (S.D. Ia. 1980); *Music Stop, Inc. v. City of Ferndale*, 488 F.Supp. 390 (E.D. Mich. 1980); *Knoedler v. Roxbury Township*, 485 F.Supp. 990 (D. N.J. 1980); *Record Museum v. Lawrence Township*, 481 F.Supp. 768 (D. N.J. 1979); *Bambu Sales, Inc. v. Gibson*, 474 F.Supp. 1297 (D. N.J. 1979); *Smith v. Roark*, No. 80-2110 (S.D. W.Va. May 13, 1980); *Indiana Chapter, N.O.R.M.L., Inc. v. Sendak*, No. TH 75-142-C (S.D. Ind. Feb. 4, 1980).

4. LB 991 tracks the Model Act while omitting those portions relevant to the propagation and harvesting of drugs. For purposes of this appeal, the single significant variation from the Model Act occurs in Section 2. Section 2 of LB 991 directs that "a court or other authority *shall consider*" (emphasis added) fourteen enumerated factors in determining whether an object is drug paraphernalia. The Model Act directs that a court or other authority "*should consider*" (emphasis added) these factors.

the enumeration of specific items is similar to that found in statutes which have been held unconstitutional,[5] LB 991 is significantly different in coupling the named items to the mental element of intent.

Section 2 of LB 991 names fourteen factors which "a court or other authority shall consider, in addition to all other logically relevant factors," in determining whether an object is drug paraphernalia.

Section 3 defines the substantive criminal offense of using, or possessing with intent to use, drug paraphernalia.

Section 4 defines the substantive criminal offense of delivery, possession with intent to deliver, or manufacture with intent to deliver drug paraphernalia, when the deliverer, possessor or manufacturer knows or reasonably should know that the drug paraphernalia will be used with controlled substances.

Section 5 makes delivery of drug paraphernalia to a minor a special offense.

Section 6 makes criminal the placing of any written advertisement when one knows or reasonably should know that the purpose of the advertisement is to promote the sale of objects designed or intended for use as drug paraphernalia.

Finally, LB 991 contains a civil forfeiture section and a severability section.

The district court, in an as-yet unpublished opinion, *The Casbah, Inc. v. Thone*, Civ. No. 80-0-271 (D. Neb. Sept. 26, 1980), held the statute to be constitutional after severing

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5. For example Section 1(4) (a-m) of LB 991 is similar to statutes in *Geiger v. City of Eagan, supra*, 618 F.2d at 28-29; *Music Stop, Inc. v. City of Ferndale, supra*, 488 F.Supp. at 391; *Record Museum v. Lawrence Township, supra*, 481 F.Supp. at 771; *Smith v. Roark, supra*, slip op. at 4-5.

subsection (11) of Section 2, which requires courts and law enforcement officials to consider whether a person is a "legitimate supplier" of like items. Also severed as unconstitutionally vague was the provision in Sections 4 and 6 for prosecution where the defendant "reasonably should know" the effects of his actions.

C. Issues on Appeal.

Appellants raise four issues on appeal. First, they contend that the district court erred in failing to review the Nebraska statute under a strict scrutiny standard of review. Second, they contend that the district court usurped the legislature's function by substantially rewriting the statute. Appellants' third contention is that the statute as written is impermissibly vague and overbroad. Finally, appellants contend that the district court erred in finding that the statute does not violate fourth amendment rights against unreasonable searches and seizures.

The Nebraska Civil Liberties Union appears as amicus curiae for the limited purpose of arguing that Sections 6 and 7 of the statute, pertaining to advertising and civil forfeiture of written materials, offend the first amendment.

Appellees by cross-appeal allege that the district court erred in holding the "legitimate supplier" provision of Section 2(11) unconstitutionally vague, and in holding the "reasonably should know" standard in Sections 4 and 6 unconstitutionally vague.

We have jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. The parties have raised no challenge on jurisdictional grounds and have not asked us to abstain.[6] *Hunt v. Roth*, No. 80-2067 (8th Cir. May 13, 1981).

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6. We have considered, however, whether the branch of abstention doctrine elaborated in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), requires abstention. We conclude that

(Continued on following page)

D. Standard of Review.

In dealing with the merits of appellants' constitutional challenge, we have considered the standard of review to be applied. Appellants contend that a standard of strict scrutiny applies because LB 991 implicates first amendment rights and "a right to privacy under the fourth amendment."

We omit for the moment the matter of first amendment rights, reserving this issue for Section V, *infra*. Appellants' argument regarding the right to privacy is wholly without merit. It is true that the fourth amendment embraces the right to be free from unreasonable governmental intrusions into traditionally private areas, *Payton v. New York*, 445 U.S. 573 (1980); *United States*

Footnote continued—

it does not. *See generally Coley v. Clinton*, 635 F.2d 1364, 1373 (8th Cir. 1980), and *George v. Parratt*, 602 F.2d 818 (8th Cir. 1979).

A number of courts have considered whether the constitutional questions presented by the Model Act could be obviated by state court interpretations. *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916, 925-26 (6th Cir. 1980), *vacated and remanded*, 49 U.S.L.W. 3882 (U.S. May 26, 1981) (No. 80-1507); *Mid-Atlantic Accessories Trade Association v. Md.*, 500 F.Supp. 834, 841 (D. Md. 1980); *cf. High Ol' Times, Inc. v. Busbee*, 621 F.2d 135, 141 (5th Cir. 1980) (district court held to have abused its discretion in abstaining from decision in challenge to statute similar to Model Act); *Record Head Inc. v. Olson*, 476 F.Supp. 366 (D. N.D. 1979) (abstention not appropriate in challenge to statute similar to Model Act). We concur in the reasoning of these cases, which hold that abstention is inappropriate where, as here, construction by the state courts would not significantly alter the federal constitutional issue. *Railroad Commission v. Pullman Co.*, *supra*, 312 U.S. at 498. Although state court construction might eliminate or narrow certain issues of vagueness, it would not eliminate the first and fourth amendment issues before the court.

Moreover, since this is not a case which raises difficult or obscure state law questions, the second factor cited in *Pullman* as supportive of abstention is absent here. *Id.* at 499. Abstention is the exception rather than the rule, *Dwickler v. Koota*, 389 U.S. 241 (1967), and should not be applied here to deprive appellants of their chosen federal forum.

v. Houle, 603 F.2d 1297, 1300-01 (8th Cir. 1979) (and citations therein). Here, however, for reasons indicated in Section IV, *infra*, neither fourth amendment rights nor privacy rights are implicated in LB 991. LB 991 on its face creates no classifications and applies equally to everyone. Where no suspect classifications are involved and no fundamental rights, the question under equal protection analysis is whether the legislation is reasonably related to a legitimate state purpose. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *Mid-Atlantic Accessories Trade Association v. Maryland, supra*, 500 F.Supp. at 849. Similarly, we apply here the rational basis standard of review.

II

Two considerations are basic to our decision on the merits. The first is our belief that we are empowered to articulate the meaning of the drug paraphernalia statute in a manner which supports a finding of constitutionality. The second is our conclusion that the element of intent saves the Nebraska statute from unconstitutional vagueness. On each matter, after careful consideration, we reach a different conclusion from that of the Sixth Circuit, the only other Court of Appeals to have considered the Model Act. *Record Revolution No. 6, Inc. v. City of Parma, supra*, 638 F.2d 916.

Appellants' first contention is that the district court exceeded its authority in construing and severing the Nebraska statute so as to render it constitutional.

We recognize that a federal court must take a state statute as written and cannot find the statute constitutional by remedying the defects which render it imprecise. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976). *See also Smith v. Goguen*, 415 U.S. 566, 575 (1974); *Gooding*

v. Wilson, 405 U.S. 518, 520 (1972). Only the state courts may authoritatively construe state legislation. *Id.; United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971). We are not prevented, however, from "extrapolat[ing] allowable meaning." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). Obviously, a federal court must determine what a state statute means before judging its facial constitutionality. *Broadrick v. Oklahoma*, 413 U.S. 601, 618 n. 16 (1973).

Viewing LB 991 as a whole and construing its facial terms within the limits of our judicial powers, we conclude that the statute is constitutional. *But see Record Revolution No. 6, Inc. v. City of Parma, supra*, 638 F.2d at 927 (Sixth Circuit opinion is shaped by the court's "lack of power to put a limiting construction on the municipal ordinances."). We conclude that the language of the Model Act supports a saving construction which we are empowered to articulate, *cf. Florida Businessmen for Free Enterprise v. Florida*, 499 F.Supp. 346, 352 (N.D. Fla. 1980) (statute offered no language to support judicial restructuring) and we are obliged to favor an interpretation which renders the statute constitutional. *United States v. Vuitch*, 402 U.S. 62 (1971); *Turchick v. United States*, 561 F.2d 719, 723-24 (8th Cir. 1977); *Tollett v. United States*, 485 F.2d 1087, 1098 (8th Cir. 1973).

III

The heart of appellants' case is the contention that LB 991 is unconstitutionally vague and overbroad, in violation of the due process clause of the fourteenth amendment. The issues of vagueness and overbreadth have been extensively discussed in nearly every case involving the Model Act. For this reason, our discussion is abbreviated. We rely upon the reasoning of those courts which have con-

cluded that the Act survives these constitutional challenges.[7]

We turn first to the issue of vagueness. As this court recognized in *Geiger v. City of Eagan, supra,* 618 F.2d at 28, due process has two requirements: that laws provide notice to the ordinary person of what is prohibited and that they provide standards to law enforcement officials to prevent arbitrary and discriminatory enforcement.[8] Ap-

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7. Cases holding the Model Act or a modified version of the Model Act not vague or overbroad include *Tobacco Accessories & Novelty Craftsmen Merchants Ass'n v. Treen,* 501 F.Supp. 168 (E.D. La. 1980); *Mid-Atlantic Accessories Trade Ass'n v. Md., supra,* 500 F.Supp. 834; *Delaware Accessories Trade Ass'n v. Gebelein,* 497 F.Supp. 289 (D. Del. 1980); *World Imports, Inc. v. Woodbridge Township,* 493 F.Supp. 428 (D. N.J. 1980); *New England Accessories Trade Association, Inc. v. City of Nashua,* Civ. No. 80-530-D (D. N.H. Dec. 8, 1980); *Florida Businessmen for Free Enterprise v. City of Hollywood,* No. 80-6157-Civ-HCR (S.D. Fla. Aug. 29, 1980).

Cf. cases upholding legislation based on the Model Act after severing portions thought to be impermissibly vague or overbroad. *Florida Businessmen for Free Enterprise v. Fla., supra,* 499 F.Supp. 346 (offense of possession, without mens rea of intent, severed as unconstitutional); *New England Accessories Trade Ass'n v. Browne,* 502 F.Supp. 1245 (D. Conn. 1980) ("reasonably should know" standard severed).

But see cases holding that particular phrases in the Model Act are impermissibly vague, and that the entire legislation is infected by the vague portions. *Record Revolution No. 6, Inc. v. City of Parma, supra,* 638 F.2d 916; *Lazy J., Ltd. v. Borough of State College,* Civ. No. 80-1167 (M.D. Pa. Jan. 30, 1981); *Back Door Records v. City of Jacksonville,* No. LR-C-80-314 (E.D. Ark. Jan. 8, 1981); *General Stores, Inc. v. City of Albuquerque,* No. 81-0027-M, Civil (D. N.Mex. March 23, 1981) (modified version of Model Act); *Weiler v. Carpenter,* 507 F.Supp. 837 (D. N.Mex. 1981); *Brache v. County of Westchester,* 507 F.Supp. 566 (S.D. N.Y. 1981) (modified version of Model Act); *Indiana Chapter, N.O.R.M.L. v. Sendak, supra,* No. TH 75-142-C (S.D. Ind. Feb. 4, 1980) (modified version of Model Act).

8. This standard is set forth more fully in *Grayned v. City of Rockford, supra,* 408 U.S. at 108-09 (footnotes omitted):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is pro-

pellants contend that numerous phrases in LB 991 violate one or both of these constitutional criteria.

A. "Intended for Use."

Appellants argue first that the definition of drug paraphernalia in Section 1 as including "all equipment, products, and materials of any kind *intended for use*" (emphasis added) with controlled substances is impermissibly vague because the statute does not specify whose intent is relevant. The problem is characterized as one of "transferred intent," insofar as the intent of a second party could allegedly be attributed to an innocent party as a basis for prosecution. Appellants contend, for example, that the statute would permit prosecution of an innocent seller or manufacturer of an innocuous item such as a spoon, if the item were intended by a buyer for use with controlled substances.

We cannot subscribe to this interpretation of the statutory language. A fair reading of the statute *as a whole* indicates that the intent referred to is that of the person alleged to have violated the statute. What seems at first glance to be a deficiency in draftsmanship is explained by the fact that the definitional section is intended to draw four categories of persons (manufacturers, wholesalers, retailers and purchasers) within the reach of the legislation. Sections 3 and 4, in defining substantive offenses, provide

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> hibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

See also Buckley v. Valeo, 424 U.S. 1 (1976); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

clarity by linking the requirement of intent with the person whose activity is forbidden:

> It shall be unlawful for any person to use, or to possess with intent to use, drug paraphernalia. [Section 3]
>
> It shall be unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia. [Section 4]

In sum, the Nebraska statute adequately defines the mental state required to render an item drug paraphernalia and refers to the intent of the person charged with violation.[9] *Accord, Record Revolution No. 6, Inc. v. City of Parma, supra,* 638 F.2d at 928 & n.14; *New England Accessories Trade Association v. Browne, supra,* 502 F.Supp. at 1251; *Mid-Atlantic Accessories Trade Association v. Maryland, supra,* 500 F.Supp. at 844; *Delaware Accessories Trade Association v. Gebelein, supra,* 497 F.Supp. at 292-93.

B. "Designed for Use."

Appellants renew their argument regarding transferred intent in contending that paraphernalia cannot constitutionally be defined as items "designed for use" with controlled substances. Again, this definition is said to be defective in failing to specify whose design is relevant.

The same reasoning that saves the phrase "intended for use" applies to the phrase "designed for use." There is no

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9. While we find the intent requirement of the Nebraska ordinance constitutional, we note the greater clarity of an Indiana statute approved in *Nova Records, Inc. v. Sendak,* 504 F. Supp. 938, 940-41 (S.D. Ind. 1980). The Indiana statute does not provide a laundry list of objects which, coupled with the requisite intent, constitute drug paraphernalia. *Id.* at 944. Rather, the statute utilizes specific intent only in defining the statutory offenses. The offenses of manufacture or design, delivery, and possession are each separately defined, along with the intent relevant to each.

basis for holding that the legislation escapes vagueness with respect to "intended for use" but fails with "designed for use." *Mid-Atlantic Accessories Trade Association v. Maryland, supra,* 500 F.Supp. at 845; *Brache v. County of Westchester, supra,* 507 F.Supp. at 577; *but see Record Revolution No. 6, Inc. v. City of Parma, supra,* 638 F.2d at 930.

Appellants also argue that the word "designed" refers to the physical attributes of an object rather than to the intent of the person charged with violation. The Sixth Circuit in *Record Revolution No. 6, Inc. v. City of Parma, supra,* 638 F.2d at 930-31, found this argument persuasive, and held that drug paraphernalia could not be adequately defined in terms of unique design characteristics.

We cannot agree that the term "designed" refers to the structure of an object. The comments to the Model Act expressly indicate the contrary, specifying that items are innocent until coupled with the intentional act of design. *Accord, New England Accessories Trade Association, Inc. v. Browne, supra,* 502 F.Supp. at 1251; *Mid-Atlantic Accessories Trade Association v. Maryland, supra,* 500 F.Supp. at 844-45; *Delaware Accessories Trade Association v. Gebelein, supra,* 497 F.Supp. at 291-92.

C. Exemplary Drug Paraphernalia.

Appellants also assert that the list of items exemplary of drug paraphernalia in Section 1[10] is vague and overbroad because it includes numerous innocent items, such as a diabetic's syringe and lactose used in infant formula.

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10. We conclude, for reasons amply spelled out by the Sixth Circuit in *Record Revolution No. 6, Inc. v. City of Parma, supra,* 638 F.2d at 932, that the listed items are exemplary only and are not irrebuttably presumed to be drug paraphernalia.

We find no flaw in the list of exemplary items because no item is drug paraphernalia absent the requisite intent to use it with controlled substances. *Cf. Record Museum v. Lawrence Township, supra,* 481 F.Supp. 768 (list of paraphernalia, absent requirement of intent, was impermissibly vague, as there was no provision for distinguishing between innocent and non-innocent use). The language of intent is expressly reiterated in the list of items in Section 1(1)-(4).

D. Factors Relevant to Determining Drug Paraphernalia.

Appellants next attack Section 2 of the statute, which sets forth fourteen factors that must be considered in determining whether an object is drug paraphernalia. We find it unnecessary to reiterate the specifics of appellants' attack on each of the fourteen factors. Appellants contend essentially (1) that the reference to "other authority" is vague, and (2) that several of the factors would permit conviction based on transferred intent and guilt by association.

There is no perceptible problem in the statutory reference to authorities other than the courts who may utilize the list of enumerated factors in determining what is drug paraphernalia. "Other authority" certainly refers to law enforcement personnel. The fact that the statute attempts to guide such personnel in their enforcement duties lessens, rather than increases, the danger of arbitrary enforcement.

The enumerated factors themselves pose no constitutional problem, and are valuable guides in determining what items are prohibited. *New England Accessories Trade Association v. Browne, supra,* 502 F.Supp. at 1251. Admittedly, the actions of third parties are relevant in

determining what is drug paraphernalia.[11] However, appellants overstate the problems of transferred intent and guilt by association by contending that third party actions are sufficient for conviction. In fact, evidence regarding third party actions is but one step in the prosecutorial scheme. If third party actions as referred to in Section 2, tend to indicate that an item is drug paraphernalia, the focus of inquiry must necessarily shift to the intent of the individual involved. *Mid-Atlantic Accessories Trade Association v. Maryland, supra,* 500 F.Supp. at 846-47; *but see Record Revolution No. 6, Inc. v. City of Parma, supra,* 638 F.2d at 933-34 (the list of logically relevant factors might permit conviction on the impermissible theory of guilt by association, but for due process requirement under Ohio law that guilt be based on personal action).

E. "Reasonably Should Know."

The final prong of appellants' vagueness argument involves the definition of substantive offenses in Sections 4 and 6. These sections make it unlawful to deliver, possess with intent to deliver, manufacture with intent to deliver or advertise drug paraphernalia in circumstances where one knows or "reasonably should know" that the items will be used with drugs (Section 4) or that the purpose of the advertisement is to promote the sale of drug paraphernalia (Section 6). Appellants allege, and the district court agreed, that the phrase "reasonably should know" will permit conviction under an impermissibly vague negligence standard, and will leave innocent sellers in the un-

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11. For example, Section 2(3) provides that authorities shall consider "[t]he proximity of the object to any controlled substance." Thus the proximity of marijuana in the hands of smokers outside of a store to roach clips inside the store might be considered as *one factor* in assessing whether the clips were intended as drug paraphernalia by the store owner. *See also* Section 2(1), (4), (5), and (6).

tenable posture of trying to divine the intentions of their buyers.

In addressing this contention, we cannot do better than to adopt the cogent reasoning of Judge Stapleton in *Delaware Accessories Trade Association v. Gebelein, supra,* which we set forth in the margin.[12] Essentially, Judge Stapleton noted that a seller must already have intended that the item be sold for drug use before his knowledge of its use by a buyer comes into play. *Accord, Mid-Atlantic Accessories Trade Association v. Maryland, supra,* 500 F. Supp. at 845. In these circumstances, it is not constitutionally improper that the seller be required to open his eyes to the objective realities of the sale. *Id.* As more than one court has noted, there are many statutes which utilize a "reasonably should know" or similar standard[13]

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12. In the context of an alleged sale or delivery of drug paraphernalia, the Act requires the state to prove both (1) that the defendant intended that an item would be used for the production or consumption of controlled substances and also (2) that he either knew, or that he acted in a set of circumstances from which a reasonable person would know, that the buyer of the item would thereafter use it for those purposes. So-called constructive knowledge thus has significance only in a situation where the defendant is selling or delivering items that he intends to be used to produce or consume illicit drugs in the first place. The legitimate merchant who sells innocuous items need make no judgment about the purpose of the buyer based upon the surrounding circumstances. The dealer, on the other hand, who sells innocuous items with the intent that they be used with drugs is, in effect, put on notice by the illicit nature of his activity that he must be careful to conform his conduct to the law. Even the illicit dealer, however, is not held legally responsible, as plaintiffs would suggest, for guessing what is in the mind of a buyer. The seller is safe as long as he does not actually know the buyer's purpose and as long as the objective facts that are there for him to observe do not give fair notice that illegal use will ensue.

497 F.Supp. at 294.

13. 8 U.S.C. § 1185(a)(2); 15 U.S.C. §§ 78dd-1, 78dd-2, 1397, 1916, 2068, 2614; 18 U.S.C. §§ 491, 922, 954, 1384, 2154, 2423, 2512; 26 U.S.C. § 999; 42 U.S.C. §§ 263j, 5409; 46 U.S.C. § 1461.

and which have withstood constitutional attack. *Delaware Accessories Trade Association v. Gebelein, supra,* 497 F. Supp. at 294, *citing Selzman v. United States,* 268 U.S. 466 (1925); *United States v. Featherston,* 461 F.2d 1119 (5th Cir.), *cert. denied,* 409 U.S. 991 (1972).[14]

IV

Appellants' fourth amendment argument requires only cursory discussion.

Appellants allege, first, that the Nebraska statute would allow a police officer to seize an innocent item such as a pipe without probable cause. This argument ignores both the requirement of intent in the definition of drug paraphernalia, and the factors in Section 2 which an officer must consider in determining whether an object is drug paraphernalia. There is simply nothing in LB 991 which alters the requirement that searches and seizures be based on probable cause. *Delaware Accessories Trade Association v. Gebelein, supra,* 497 F.Supp. at 296; *see also Mid-Atlantic Accessories Trade Association v. Maryland, supra,* 500 F.Supp. at 848-49.

Secondly, appellants object to the provision for civil forfeiture of drug paraphernalia.[15] Section 7 of LB 991

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14. Finally, we address appellants' overbreadth argument to the effect that the statute sweeps innocent items within its ambit. This is merely a species of the vagueness argument. Given the requirement of intent, no innocent item will be impermissibly brought within the state's control.

15. Appellants also object to certain sections of Neb. Rev. Stat. § 28-431 (Supp. 1978) which predate LB 991, particularly subsections (1)(b), (1)(d) and (2) of Section 28-431. These subsections allow the warrantless seizure of "raw materials, products, and equipment . . . used, or intended for use, in manufacturing . . . or administering . . . any controlled substance" (Section (1)(b)), and of "conveyances . . . used, or intended for use, in transporting any controlled substance" (Section 1(d)).

(Continued on following page)

adds "drug paraphernalia" to the list of items which are subject to civil forfeiture under Neb. Rev. Stat. § 28-431 (1) (Supp. 1978), as follows:

> (1) The following shall be seized without warrant by an officer of the Division of Drug Control or by any peace officer, and the same shall be subject to forfeiture: . . . (f) all drug paraphernalia defined in section 1 of this act.

The basis for appellants' objection to this provision is somewhat unclear. Insofar as the just compensation and due process provisions of the fifth and fourteenth amendments may allegedly be implicated in civil forfeiture, however, we note that forfeiture which helps to render illegal behavior unprofitable, without prior notice and hearing, has been approved by the Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). The Supreme Court of Nebraska has also specifically approved as constitutional the provision for forfeiture of conveyances involved in drug traffic under

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Footnote continued—

We decline to reach these provisions of § 28-431 for several reasons. First, appellants' complaint in district court seeking injunctive and declaratory relief was addressed to "Sections 28-101 and 28-431 *as amended by LB 991*" (emphasis added). The complaint was not addressed to those portions of Neb. Rev. Stat. § 28-431 which predate the amendments. The district court's memorandum opinion did not consider statutory material outside of the amendments made by LB 991.

Secondly, were we to consider statutory material beyond that added by LB 991, we would necessarily be confronted by unsettled and unclear issues of state law. There is room for doubt as to whether the "equipment" subject to forfeiture under subsection (1)(b) of Neb. Rev. Stat. § 28-431 (Supp. 1978) includes drug paraphernalia as defined by LB 991. Arguably it does not, since LB 991 makes *separate* provision for the civil forfeiture of drug paraphernalia. In any case, under the doctrine of abstention articulated in *Railroad Comm'n v. Pullman Co., supra*, 312 U.S. 496, we would decline to reach constitutional issues involved in subsections (1)(b) and (1)(d) and (2) of Neb. Rev. Stat. § 28-431 (Supp. 1978).

the predecessor[16] of Neb. Rev. Stat. § 28-431 (Supp. 1978). *State v. One 1968 Volkswagen*, 198 Neb. 45, 251 N.W.2d 666 (1977); *State v. One 1970 2-Door Sedan Rambler (Gremlin)*, 191 Neb. 462, 215 N.W.2d 849 (1974). The provision for seizure of drug paraphernalia is analogous, and in our view, constitutional.[17]

V

The final challenge to the Nebraska statute, raised by the Nebraska Civil Liberties Union (NCLU), is that first amendment interests are implicated in Sections 6 and 7.

The NCLU objects to subsection (1)(e) of Section 7, which permits the warrantless seizure of

> books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use in violation of the provisions of this article.

The validity of this provision is open to serious question. *Blount v. Rizzi*, 400 U.S. 410, 417 (1971); *Freedman v. Maryland*, 380 U.S. 51 (1965). The statute does not provide for prompt judicial review of this prior restraint

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16. Neb. Rev. Stat. § 28-4, 135 (1943).

17. When "conveyances" are seized, Nebraska law provides a strict time limit for the filing of a complaint for condemnation by law enforcement personnel. *See* Neb. Rev. Stat. § 28-431(4) (Supp. 1978). This time limit allows the forfeiture provision to satisfy procedural due process. *State v. One 1970 2-Door Sedan Rambler (Gremlin)*, *supra*, 215 N.W.2d at 851.

The time limit applicable to "conveyances" arguably does not apply to require the filing of a complaint when drug paraphernalia is seized. However, appellants have not raised or briefed the issue of their due process rights to post-seizure procedural safeguards. On the record before us, we hold only that procedural due process is not violated by the provisions for seizure of drug paraphernalia without opportunity for *prior* hearing. *Calero-Toledo v. Pearson Yacht Leasing Co.*, *supra*, 416 U.S. 678-80.

on expression, nor does it place the burden of initiating judicial review on censoring personnel. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559-60 (1975); *Blount v. Rizzi, supra; cf. United States v. Thirty-Seven Photographs, supra*, 402 U.S. 363.

We do not, however, reach these misgivings. Subsection (1)(e) belongs to preexisting law, Neb. Rev. Stat. § 28-431 (Supp. 1978), and was not added to the Nebraska Code by LB 991. For the reasons indicated in n.15, *supra*, we decline to consider this statutory material.

First amendment objections are also raised to Section 6, which prohibits advertising that promotes, in whole or in part, the sale of objects designed or intended for use as drug paraphernalia. Although the issue may be close, we conclude that this ban withstands constitutional challenge. Our conclusion is based on three considerations: (1) the statute circumscribes only commercial speech; (2) the speech embraced by the statute directly promotes an illegal activity; and (3) the overbreadth doctrine does not apply to commercial speech to the same extent as it does to non-commercial speech.

We begin our analysis with the question whether the statute reaches only commercial speech. Since the statutory prohibition applies to "advertisement[s]," the answer might appear to be self-evident. However, we proceed mindful of a lack of a clear definition of commercial speech from the Supreme Court. *See Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561, 562 (1980) (commercial speech is characterized alternately as "expression related solely to the economic interests of the speaker and its audience" and "speech proposing a commercial transaction"); *but see id.* at 579 (Stevens, J., and Brennan, J. concurring) (majority's description of commercial speech is both too broad

and too narrow); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) (commercial speech proposes a commercial transaction); *Bigelow v. Virginia*, 421 U.S. 809, 821 (1975); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 384, 385 (1973) (speech is not rendered commercial by mere fact that it relates to an advertisement; critical feature is whether it proposes a commercial transaction).[18]

Here, the Nebraska statute forbids only "advertisement[s]" which promote the "sale of objects" designed or intended for use as drug paraphernalia. The statute facially does not reach speech which merely glorifies the drug culture without direct invitation to purchase specific items. Accordingly, we conclude that the statute regulates commercial speech in its narrowest sense, that is, speech which proposes a commercial transaction. *But see Record Revolution No. 6, Inc. v. City of Parma, supra*, 638 F.2d at 937. Such commercial speech is entitled to lesser protection than other constitutionally guaranteed expression. *Central Hudson Gas & Electric Corp. v. Public Service Commission, supra*, 447 U.S. at 563 & n.5; *Wickens v. White*, 536 F.2d 802, 804 (8th Cir. 1976) (per curiam); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 832-33 (8th Cir. 1976).

The next step in first amendment analysis is to inquire whether the proscribed commercial speech involves a lawful activity. Commercial speech which promotes an illegal activity may be restricted without subjecting the restriction to scrutiny under a balancing test. *Central*

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18. *See also* Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. Rev. 372, 389-90 & nn. 75-77 (1979); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 14-25 (1979); Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. Chi L. Rev. 205 (1976).

Hudson Gas & Electric Corp. v. Public Service Commission, supra, 447 U.S. at 563-64, 566; *Pittsburgh Press Co. v. Pittsburgh Commission on Human Rights, supra,* 413 U.S. at 388; *cf. Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969) (outside of commercial speech context, speech advocating violation of the law may be proscribed only where directed to inciting or producing imminent lawless action); *see also Carey v. Population Services International,* 431 U.S. 678, 701 (1977) (advertisements could not be characterized as inciting or producing imminent lawless action); Comment, *First Amendment Protection for Commercial Advertising, supra,* 44 U. Chi. L. Rev. at 220, 242 n.197, 243 n.203.

Here, advertising promoting the sale of drug paraphernalia encourages activities which are otherwise crimes under Nebraska law. Such speech is analogous to advertisements promoting the sale of narcotics or soliciting prostitution, and may constitutionally be prohibited. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, supra,* 413 U.S. at 388. It would be illogical to permit Nebraska to prohibit the sale and possession of drug paraphernalia while not allowing the state to regulate advertising which encourages these same crimes.

We acknowledge some difficulty in upholding the phrase "in part," which in Section 6 prohibits advertisements that only "in part" have the purpose of promoting the sale of drug paraphernalia. Arguably, this statutory language reaches into the protected area of advertising concerning lawful activity.

We are obliged, however, to presume a legislative intent to act within constitutional bounds. *Turchick v. United States, supra,* 561 F.2d at 723-24. Accordingly, we conclude that where drug paraphernalia is advertised along with innocent items, obviously the statute must forbid only that part of the advertisement relating to drug

paraphernalia. The remainder of the advertisement is not condemned.[19]

In sum, we affirm in part and reverse in part the judgment of the district court. As indicated, we hold LB 991 to be constitutionally valid as against the challenges we have considered.[20]

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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19. We do not decide whether the Nebraska statute is infirm on the ground of "geographical overbreadth," that is, on the ground that Section 6 could be enforced against advertisers in neighboring states where drug paraphernalia is not banned. Out-of-state advertisers arguably have a first amendment right to make their wares known to Nebraska citizens. *Bigelow v. Virginia, supra*, 421 U.S. 809, 824-25; *but see* Comment, *First Amendment Protection for Commercial Advertising, supra*, 44 U. Chi. L. Rev. at 214 n.61 (and citations therein).

While there may be merit to the geographical overbreadth argument, *see Record Revolution No. 6, Inc. v. City of Parma, supra*, 638 F.2d at 937, this is not an appropriate case in which to consider the interests of out-of-state merchants. The interests of such advertisers are wholly unrepresented in this suit. The Nebraska Civil Liberties Union represents only its Nebraska members. Appellants have not argued first amendment issues on this appeal. If we were to consider the interests of out-of-state retailers, we would necessarily utilize the overbreadth doctrine to consider third parties who do not reside in the enforcing state, against whom enforcement may be problematic, and whose interests are raised only by an amicus party. We doubt that the overbreadth doctrine, construed as a rule of standing, *see Turchick v. United States, supra*, 561 F.2d at 722, can be extended so far. The Supreme Court has specifically noted that the overbreadth doctrine is, if anything, less applicable in a commercial speech context. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n, supra*, 447 U.S. at 564, 565 nn.6-8; *Bates v. State Bar*, 433 U.S. 350, 381 (1977).

20. As a final note we observe that after the text of this opinion was prepared but before it could be published, the Tenth Circuit in *Hejira Corp. v. MacFarlane*, No. 80-2062 (10th Cir. May 5, 1981), undertook to construe a Colorado statute similar to but not identical with the Model Act. We have reexamined our position in light of the view of the Tenth Circuit as expressed in *Hejira* and in doing so have found much that tends to support our decision here. In construing the Model Act, however, we do not find it necessary to conclude, as did the Tenth Circuit, that statutory standards set forth as guidelines for identifying drug paraphernalia are to be read as "a part of the definition of the crime." *Id.*, slip op. at 28

APPENDIX B

Memorandum Opinion of the United States District Court

(Filed September 26, 1980)

Civil No. 80-0-271

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THE CASBAH, INC.; THE DISCO-COUNTER, INC.; JEFFREY FERBER, d/b/a H.&D. SALES; GREGORY HASSELHORST, d/b/a EUPHORIA; ERIC LISTOU, d/b/a JOINT VENTURE NOVELTY SHOP; PIPE DREAM, INC.; and DENNIS ROBINSON, d/b/a THE JOYNT,
Plaintiffs,

vs.

CHARLES THONE, Governor of the State of Nebraska; PAUL DOUGLAS, Attorney General for the State of Nebraska; ELMER KOHMEPSHER, Colonel in Charge of the Nebraska State Patrol; and DONALD L. KNOWLES, County Attorney for Douglas County, Nebraska.
Defendants.

MEMORANDUM

ROBINSON, *Senior Judge.*

In this action, the plaintiffs challenge the constitutionality of L.B.991, a Nebraska statute regulating the use, distribution and advertisement of "drug paraphernalia." In their verified complaint, the plaintiffs seek declaratory and injunctive relief. The Court has juris-

diction under 28 U.S.C. §§ 1331, 1343, 2201 and 2202.[1] This Memorandum constitutes the Court's findings of fact and conclusions of law.

On April 23, 1980 this Court, pursuant to an agreement of counsel, entered an Order [Filing #6] temporarily restraining the enforcement of L.B.991 pending a final determination on the merits. Commencing on September 4, 1980, plaintiffs' application for a preliminary and permanent injunction was tried to the Court. *See* Rule 65(a)(2) Fed.R.Civ.Pro. For the reasons setout below, the Court finds that L.B.991 is constitutional as it is construed in this Memorandum.

I

The plaintiffs in this action are wholesale distributors and retail merchants who sell various gifts and novelty items including what are euphemistically referred to as accessories.[2] The defendants include Charles Thone, the Governor for Nebraska, Elmer Kohmepsher, of the Nebraska State Patrol, Paul Douglas, the Nebraska Attorney General, and Donald Knowles, the Douglas County Attorney.

L.B.991 was passed by the Nebraska Unicameral on April 18, 1980 and signed into law five days later by Governor Thone. The Bill amends various sections of the *Nebraska Criminal Code*[3] and provides in pertinent part as follows:

> Section 1. As used in this act, unless the context otherwise requires, drug paraphernalia shall mean all equipment, products, and materials of any kind which are used, intended for use, or designed for use, in manufacturing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this act or the Uniform Con-

trolled Substances Act. It shall include, but not be limited to, the following:

(1) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, used, intended for use, or designed for use in cutting controlled substances;

(2) Separating gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining marijuana;

(3) Hypodermic syringes, needles, and other objects used, intended for use, and designed for use in parenterally injecting controlled substances into the human body; and

(4) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, which shall include but not be limited to the following:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) Water pipes;

(c) Carburetion tubes and devices;

(d) Smoking and carburetion masks;

(e) Roach clips, meaning objects used to hold burning material, such as a marijuana cigarette, which has become too small or too short to be held in the hand;

(f) Miniature cocaine spoons, and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chillums;

(l) Bongs; and

(m) Ice pipes or chillers.

Section 2. In determining whether an object is drug paraphernalia, a court or other authority shall consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;

(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;

(3) The proximity of the object, in time and space, to a direct violation of this act;

(4) The proximity of the object to any controlled substance;

(5) The existence of any residue of a controlled substance on the object;

(6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to any person whom he or she knows, or should reasonably know, intends to use

the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use as drug paraphernalia;

(7) Instructions, oral or written, provided with the object concerning its use;

(8) Descriptive materials accompanying the object which explain or depict its use;

(9) National and local advertising concerning its use;

(10) The manner in which the object is displayed for sale;

(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(12) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise;

(13) The existence and scope of any legitimate use for the object in the community; and

(14) Expert testimony concerning its use.

Section 3. (1) It shall be unlawful for any person to use, or to possess with intent to use, drug paraphernalia to manufacture, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this act.

(2) Any person who violates this section shall be guilty of an infraction.

Section 4. (1) It shall be unlawful for any person to deliver, possess, with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to manufacture, inject, ingest, inhale, or otherwise be used to introduce into the human body a controlled substance in violation of this act.

(2) Any person who violates this section shall be guilty of a Class II misdemeanor.

Section 5. Any person eighteen years of age or older who violates section 4 of this act by delivering drug paraphernalia to a person under eighteen years of age who is at least three years his or her junior shall be guilty of a Class I misdemeanor.

Section 6. (1) It shall be unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(2) Any person who violates this section shall be guilty of a Class III misdemeanor.

Section 7 of L.B.991 amends § 28-431 of the *Nebraska Revised Statutes* in that it adds drug paraphernalia to the list of items subject to civil forfeiture. The relevant portion of Section 7 provides:

> That section 28-431, . . . be amended to read as follows: 28-431. (1) The following shall be seized without a warrant by an officer of the Division of Drug Control or by any peace officer, and the same shall be subject to forfeiture:

> (a) All controlled substances which have been manufactured, distributed, dispensed, acquired, or possessed in violation of the provisions of this article; . . . (f) all drug paraphernalia defined in section 1 of this act.

Section 10 of L.B.991 is a severability provision:

> If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof.

L.B.991 is similar to legislation passed in other jurisdictions aimed at regulating or prohibiting the sale of items used to ingest controlled substances.[4] Without exception, these laws are intended to aid in the struggle against drug abuse, particularly among young people.[5] Testimony concerning the extent of the drug problem was presented at the public hearings on L.B.991. An adolescent psychiatrist employed by the Nebraska Psychiatric Institute testified that "as many as one out of nine of our high school students are using [marijuana] daily."[6] He pointed out that there are severe emotional and physical ailments associated with chronic marijuana use. Observing that certain devices used to smoke marijuana make it possible to bring concentrated marijuana smoke into the body, the psychiatrist noted that daily marijuana use with these devices was extremely damaging to the lungs and promoted respiratory ailments including bronchitus, emphysema and cancer.[7]

There is no doubt that the State of Nebraska in protecting the health and welfare of its citizens may legitimately enact legislation intended to curtail illicit drug use. *Robinson v. California,* 370 U.S. 660, 664 (1962). If it is properly drawn, legislation dealing with the acute

problem of drug abuse may prohibit the sale of "drug related devices." *Geiger v. City of Egan*, 618 F.2d 26, 28 (8th Cir.1980).

II

Despite its laudable purpose, legislation banning drug paraphernalia must pass constitutional muster. Elsewhere, lawmakers have rushed to pass laws banning paraphernalia and in the process have trampled upon a host of rights protected by the Constitution. *See e.g. Geiger v. City of Egan, supra*; *Knoedler v. Roxbury Township*, 485 F.Supp. 990 (D.N.J.1980); *Magnani v. City of Ames*, No. 80-229-A (S.D.Iowa 1980).

The Nebraska statute differs from the laws invalidated in the above cases in that it is patterned after the "Model Drug Paraphernalia Act" (hereinafter Model Act). The Model Act was drafted by the Drug Enforcement Administration of the United States Department of Justice and seeks to avoid the constitutional infirmities which have plagued other paraphernalia laws. Notwithstanding its similarities to the Model Act, the plaintiffs assail the constitutionality of L.B.991 on several fronts. They claim that the statute places an impermissible burden on interstate commerce, violates the First and Fourth Amendments, is vague and overbroad, and lacks the specific intent required by due process.

Before considering each of plaintiffs' contentions, it is helpful to review the general principles which obtain whenever it is claimed that a statute is facially unconstitutional. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975) the facial validity of a city ordinance was challenged. There, the Court set out several principles which are applicable here:

> [W]hen considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interferences with a state regulatory program. . . . [A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts. . . .

See Sawyer v. Sandstrom, 615 F.2d 311, 315 (5th Cir.1980).

It should also be remembered that when a criminal statute is susceptible to different interpretations, the Court should favor an interpretation which supports constitutionality. *Screws v. United States*, 325 U.S. 91, 98 (1945); *Record Revolution No. 6, Inc. v. City of Parma*, No. C80-38 (N.D.Ohio 1980). The Supreme Court recognized over ninety years ago that all statutes should be given a sensible construction and judicial common sense requires that "[g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 461 (1892). This insight is still good law today and is particularly applicable when a court is asked to construe a drug paraphernalia law. *See The Flipside v. Village of Hoffman*, No. 78C 2114 p. 10 (N.D.Ill.1980); *Levas v. Village of Antioch*, No. 80C 1574 (N.D.Ill.1980); *Record Revolution No. 6, Inc. v. City of Parma, supra*, at 8.

There is no question that L.B.991 seeks to dam the swell of drug abuse by outlawing those devices which facilitate illicit drug use.[8] If the statute can be interpreted in a manner which is both consistent with this purpose and faithful to the Constitution, then the Court is bound to articulate that interpretation. Accordingly, in considering the arguments advanced by the plaintiffs, the

statute will be construed with a view toward identifying a constitutional construction which will meet the legislative purpose.

III

A. *Vagueness.*

It is contended that L.B.991 is unconstitutional because it violates the due process concept of "void for vagueness." Simply put, a criminal statute, like L.B.991, must give notice of what conduct the statute prohibits so that the ordinary citizen may act accordingly. The Constitution will not permit a statute to impose criminal sanctions unless it first gives notice of what conduct will result in liability. *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939). *In Grayned v. City of Rockford,* 408 U.S. 194 (1972), the Court articulated the reasons for the vagueness doctrine:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

Id. at 108-09. The Eighth Circuit Court of Appeals has fairly summarized what due process requires in the context of construing a drug paraphernalia ordinance. As

the Court said in *Geiger*, "[d]ue process has two requirements: that laws provide notice to the ordinary person of what is prohibited and that they provide standards to law enforcement officials to prevent arbitrary and discriminatory enforcement." *Supra* at 28. This is the standard against which L.B.991 must be measured.[9]

The plaintiffs' vagueness objections can be broken down into three parts. First, the plaintiffs assert that the definition of drug paraphernalia in section one is vague because virtually anything can be drug paraphernalia under the statute. Even a cursory reading of section one confirms plaintiffs' observation. Section one of L.B.991 provides in part that "drug paraphernalia shall mean *all equipment, products, and materials of any kind* which are used, intended for use, or designed for use . . . [to introduce] into the human body a controlled substance. . . ." (emphasis added). In addition, plaintiffs' evidence at trial made tediously clear that the only limit on what can be used to introduce a controlled substance into the body is imagination. The evidence established that a variety of otherwise innocent items can be used to ingest controlled substances. For example, the plaintiffs demonstrated that an aluminum can or a piece of fruit can be used to smoke marijuana.[10] If section one did no more than outlaw any item which might be used with illegal drugs, then plaintiffs' first vagueness argument would find its mark and the statute would be fatally flawed. A statute which simply prohibited the sale of all such items would be unconstitutionally vague. *See, Parma v. Record Revolution, Inc., supra* at 8 (citing *United States v. Brunnet*, 53 F.2d 219 (W.D.Mo.1931). It would fail both prongs of the due process test; it would not give notice of what is prohibited and would invite discriminatory enforcement.

Drug paraphernalia as defined in section one of L.B.991 is any item which is used, intended for use, or designed

for use in ingesting a controlled substance. This definition is not vague because it defines drug paraphernalia with reference to the intent of the person charged with an offense under the statute. The inclusion of intent in the definition of drug paraphernalia is crucial; it permits the law to identify "innocent" objects as paraphernalia when they are used with a controlled substance and at the same time exculpates otherwise "suspicious" items which are in fact used for innocent purposes.[11] The intent requirement renders plaintiffs' concern that "anything" can be paraphernalia unnecessary.

The drafters of the Model Act point out that:

> To insure that innocently possessed objects are not classified as drug paraphernalia, [the definition] makes the knowledge of *criminal intent of the person in control of an object a key element of the definition.* Needless to say, inanimate objects are neither "good" nor "bad," neither "lawful" nor "unlawful." Inanimate objects do not commit crimes. *But, when an object is controlled by people who use it illegally, or who design or adapt it for illegal use, the object can be subject to control and the people subjected to prosecution.* [The definition] requires, therefore, that an object be used, intended for use, or designed for use in connection with illicit drugs before it can be controlled as drug paraphernalia.

Model Act Comment pp. 6-7 (1979). (Emphasis added).

Intent saves the definition of drug paraphernalia from being unconstitutionally vague. It provides notice of what the statute prohibits—all items used, intended for use, or designed for use with a controlled substance—and it puts those charged with enforcing the statute on notice that a determination of what constitutes paraphernalia can be made only by identifying the intent of the suspect.

Plaintiffs claim that the "designed for use" phrase in the definition of drug paraphernalia is vague. They cite an Indiana drug paraphernalia case where the judge was troubled by the term. *Indiana Normal v. Sendak*, No. TH 75-142-C p. 13 (S.D.Ind.1980). The Court finds that the term is not vague when it is read in the context of the entire statute. "Designed for use" in L.B.991 refers not to the physical characteristics of an object but to the subjective intent or plan of the person controlling the object. The whole tenor of the statute makes clear that any object, *depending upon its use*, can be drug paraphernalia. In fact, section two of the statute sets out fourteen factors which are to be considered in determining if any given object is paraphernalia; those factors focus not on the physical features of the suspected item but on the context in which the item is found. The factors are an aid in determining whether a person "designed" the object as paraphernalia. The physical properties of an item may not offer a clue about its illicit use. As the court in *Delaware Accessories Trade Assn. v. Gebelein*, No. 80-285 p. 5 (D.Del.1980) said "the statute itself indicates that 'designed for use' refers not to structure but to intent." In short, when "designed for use" is integrated into the statute it is not vague nor even easily susceptible to misunderstanding.

Plaintiffs' second vagueness argument is more troublesome. It is contended that the definition of drug paraphernalia does not indicate whose intent is relevant. This, says the plaintiffs, makes it possible for an innocent person to be prosecuted under the statute for the unlawful intent of another[12] See *Indiana Normal v. Sendak*, No. TH 75-142-C (S.D.Ind.1980). Section one of L.B.991 does not explicitly state whose intent should be considered in determining if an object is drug paraphernalia. If section

one is read in isolation, plaintiffs' argument is plausible. However, if section one is read, as it must be, with all of the other sections of the statute it becomes clear that no transfer of intent is possible. Sections 3, 4, 5 and 6 of L.B.991 proscribe certain conduct vis a vis drug paraphernalia. Generally, section 3 prohibits possession, section 4 prohibits delivery or possession with intent to deliver, section 5 provides a more severe penalty for delivering drug paraphernalia to a minor, and section 6 makes it unlawful to advertise the sale of drug paraphernalia. An essential element of each offense is that the person knew or reasonably should have known that the object in question will be used to introduce a controlled substance into the body. A common sense reading of this requirement makes clear that it refers to *the person who is charged with the violation.* It is fundamental that to violate a criminal statute there must be an act coupled with the requisite criminal intent. "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States,* 341 U.S. 494, 500 (1951). The comments to the Model Act indicate that the definition of drug paraphernalia makes reference to intent "to insure that innocently possessed objects are not classified as drug paraphernalia." In light of the statute's mens rea requirement and the inclusion of intent in the definition of drug paraphernalia only an absurd construction of the statute would trap an innocent user or purchaser because of the guilty intent of a seller. To avoid any uncertainty, the Court specifically finds that the intent element in the definition of drug paraphernalia applies to the person charged with violating the statute. *Accord, Record Revolution v. City of Parma, supra* at 11; *Delaware Accessories Trade Assn. v. Gebelein,* No. 80-285 pp. 7-8 (D.Del.1980);

Florida Businessmen For Free Enterprise v. City of Hollywood, No. 80-6157-Civ-NCR pp. 7-8 (S.D.Fla.1980).

Finally, plaintiffs argue that section two of L.B.991 is unconstitutionally vague. Section two sets out fourteen factors which *must* be considered in determining whether an object is drug paraphernalia. It is claimed that the factors are vague and therefore lawmaking is impermissibly left "to the moment-to-moment judgment of the policeman on his beat." *Gregory v. City of Chicago*, 394 U.S. 111, 120 (1969) (Black, J. concurring). A vague statute violates due process, in part, because it magnifies the potential for discriminatory enforcement. *Geiger v. City of Egan, supra*, at 29.

In this case, the factors which are objected to do not encourage arbitrary enforcement. On the contrary, they provide law enforcement officials with a valuable guide in determining what items are prohibited by the statute. It is significant that the factors listed must be used in identifying drug paraphernalia. The fact that enforcement officials are obliged to consider the factors listed in section two minimizes the danger that an object will erroneously be identified as paraphernalia. It is important to keep in mind that under L.B.991 there are no objects which are *per se* drug paraphernalia. As a result, those charged with enforcing the law must be given adequate notice of what circumstances bring an item under the proscriptions of the statute.

With one exception, that notice is provided in section two of the statute. The exception is factor (11) which provides that in determining whether an object is drug paraphernalia the following should be considered:

> Whether the owner, or anyone in control of the object, is a *legitimate* supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.... (emphasis added).

This language was struck from a virtually identical law in the *Parma* case *supra*. For the reasons given there, the Court severs factor (11) from the statute.[13] In *Parma*, Judge Manos said:

> This portion of the Ordinance fails the second test of vagueness; the reference to "legitimate" suppliers creates a danger of arbitrary and discriminatory enforcement. Because the provisions of this Ordinance apply to *all* who use, distribute or advertise even an innocent item with the requisite intent, the term "legitimate" supplier is imprecise and misleading. (citations omitted) (emphasis original).

Except for factor (11), section two provides just the sort of criteria which judges, juries, and law enforcement officials need to make an objective decision in determining if an object falls under the statute.[14]

B. Overbreath [*sic*].

While the terms vagueness and overbreath are often used together, they are distinct concepts. A statute is impermissibly vague when its prohibitions are not clearly defined. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Even a clear and precise law may suffer from overbreath if its sweep is unnecessarily broad and it invades the area of protected freedoms. *Zwickler v. Koota*, 389 U.S. 241, 250 (1967). The overbreath doctrine generally arises in a First Amendment context because the "First Amendment needs breathing space and statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973). *See e.g. Gooding v. Wilson*, 405 U.S. 518 (1972);

Brandenburg v. Ohio, 395 U.S. 444 (1969); *Cox v. Louisiana*, 379 U.S. 336 (1965).

In this case, plaintiffs' overbreath claim is not grounded in the contention that L.B.991 abridges First Amendment freedoms.[15] Rather, plaintiffs claim that the statute is overbroad because "it draws in Articles whose major uses are overwhelmingly lawful." Plaintiffs' Pre-trial Brief at 38. Plaintiffs complain that the statute impermissibly outlaws innocent items and punishes their innocent users because of the criminal intent of others. This is nothing more than another rendition of the vagueness arguments previously discussed. The short answer to plaintiffs' overbreath objection is that no item is drug paraphernalia *per se* under the statute. Only when an object is used, intended for use, or designed for use with a controlled substance does it become prohibited. An example of how the statute operates is found in the comments to the Model Act. A spoon, a hypodermic syringe, and a length of surgical tubing all have legitimate uses in the community. "[W]hen these objects are manufactured, delivered and possessed in lawful commerce, they are not considered paraphernalia. But if these same objects are assembled and used by an addict to illegally melt heroin and inject it into the body, they become drug paraphernalia." Comments to the Model Act p. 7 (1979). L.B.991 is not overbroad because it discriminates between lawful and prohibited objects by scrutinizing the intent of the possessor or user.

C. *Specific Intent.*

The plaintiffs argue that L.B.991 violates the due process clause of the Fourteenth Amendment because it permits a person to be convicted without a showing of criminal intent. They point specifically to the "reason-

ably should know" standard in sections 4 and 6 of the statute. Section 4 provides that:

> It shall be unlawful for any person to deliver, possess with intent to deliver or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one *reasonably should know,* that it will be used . . . to introduce [a controlled substance into the body]. (Emphasis added).

It is contended that this constructive knowledge standard is at odds with the scienter requirement in the definition of drug paraphernalia. Plaintiffs correctly point out that it is inconsistent to say that intent saves the definition of drug paraphernalia from vagueness and then permit a person to be convicted of delivering "drug paraphernalia" because he or she incorrectly guessed that the item would not be used with illicit drugs. To say that before an object can be drug paraphernalia it must be used, intended for use, or designed for use with a controlled substance is to say that the definition of drug paraphernalia includes an element of general criminal intent. Faced with a nearly identical statute a Federal Court in Ohio said:

> The Court construes each of these three elements [used, intended for use, designed for use] as implying and requiring the existence of general criminal intent by the defendant. Thus, the criminal defendant's voluntary and intentional use of an item with illegal drugs makes it drug paraphernalia within the meaning of this Ordinance. . . . Adding the element of general intent not only narrows the scope of the ordinance, it insures that no one will be convicted by mistake, accident or innocent reason. *Parma, supra,* at 11.

Under the reasonably should know standard a conviction can be had without a showing of general criminal intent; that is, without establishing that the defendant specifically

intended to violate the statute. As a result, the reasonably should know standard vitiates the prophylactic effect of the scienter requirement in the definition of drug paraphernalia. The statute cannot constitutionally take away with one hand what it gives with another.

In finding the reasonably should know standard unconstitutional in a Roxbury drug paraphernalia ordinance, the Court offered a cogent example of its defect:

> [T]he seller faced with the Roxbury Ordinance has to . . . determine what the customer intends to do with the items of purchase. Certainly in a case where the purchaser announces his or her intention to utilize the paraphernalia purchased for an illegal purpose, the seller would be placed in no dilemma; however, the question arises as to what would create a reasonably belief in the mind of the seller in the absence of such an unlikely announcement by the purchaser. Does the purchaser's age, sex, mannerisms or dress afford to a seller reason to believe that the paraphernalia will be used for an illegal purpose? Or should the nature of the purchaser's companions or the items he or she carries be determinative? These questions indicate the difficulty that a merchant, as well as a law enforcement officer, would have, in the absence of an admission by the purchaser, in determining what gives rise to a reasonable belief that a purchaser intends to utilize the paraphernalia for an illegal purpose. An additional concern is whether it is proper to charge an owner of a department store, or any other store, with responsibility for a sales clerk's determination as to whether the person purchasing an item, especially an innocuous one such as a weight scale or a spoon, intends to utilize it for some improper and illegal purpose.

Knoedler v. Roxbury Township, 485 F.Supp. 990, 993 (D. N.J.1980). The reasonably should know standard is unconstitutional. It fails to give notice of what is forbidden and it forces law enforcement personnel to guess about when a seller has violated the statute. Therefore, the Court severs the reasonably should know standard wherever it appears in L.B.991.[16]

Recently, other courts have upheld the constructive knowledge requirement in construing other laws based on the Model Act. *Delaware Trade Assn. v. Gebelein*, No. 80-280 p. 11 (D.Del.1980). In *Delaware Trade Assn.* it is said that "the seller is safe so long as he does not actually know the buyer's purpose and so long as the objective facts that are there for him to observe do not give fair notice that illegal use will ensue." This analysis begs the question. The issue is precisely what set of facts do give notice of a buyer's illicit intentions. If a man wearing a business suit purchases a hookah[17] from a gift shop saying "I'll enjoy this pipe with my friends tonight," should the merchant know that the pipe will be used to ingest a controlled substance? Suppose the man entered the gift shop unshaven in jeans and a t-shirt and said the same thing. Is the merchant now on notice that the item will be used to ingest a controlled substance? Should the man's age or his mannerisms change the merchant's conclusion? Obviously, it is difficult to articulate when a merchant should reasonably know that an item he sells will be used to ingest a controlled substance. The reasonably should know standard simply cannot be justified on the theory that a merchant's "objective" observations about his customers will keep him out of harms way.

The defendants point out that the reasonably should know standard is currently found in a number of criminal statutes at both the state and federal level.[18] That the standard is pervasive does not make it constitutional in

this instance. The reasonably should know standard violates due process in this case because of the unique nature of the statute at hand. To be effective, a drug paraphernalia statute must regulate a myriad of items which have a lawful purpose. Unlike other statutes, it cannot base its proscriptions on the physical characteristics of the items in question. Rather, regulation—to be both effective and constitutional—must concentrate on the intent of the accused. To avoid imposing sanctions for innocent possession or use, a statute must provide that the accused specifically intended to violate its provisions. Where lawmakers have attempted to draft drug paraphernalia statutes without sufficiently considering the pivotal element of intent, they have found that the laws do not survive judicial scrutiny because they are vague and over inclusive. *See e.g. Magnani v. City of Ames,* No. 80-229A (S.D.Iowa 1980); *Record Museum v. Lawrence Township,* No. 79-3352 (D.N.J.1979); *Weingart v. Town of Oyster Bay,* No. 79C 2932 (E.D.N.Y. 1979). The Nebraska statute is constitutional only when specific intent is required to obtain a conviction under its provisions.

Requiring the state to prove beyond a reasonable doubt that a prohibited act was done "knowingly" minimizes the danger that a person will be convicted for an innocent act. An act is done knowingly if it is done voluntarily and intentionally, and not because of mistake or accident or innocent reason. *See United States v. Sirhan,* 504 F.2d 818 (9th Cir.1974); Devitt & Blackmar, *Federal Jury Practice and Instructions* § 14.04 (1977). The knowledge of the use to which an object will be put may be difficult for the state to prove beyond a reasonable doubt. Nevertheless, it is precisely this rigorous requirement which saves the statute from vagueness. *See Boyce Motor Lines v. United States,*[19] 342 U.S. 337 (1952).

D. *The First Amendment.*

Section 6 of L.B.991 makes it illegal to promote the sale of drug paraphernalia by advertising in *any* publication.[20] The plaintiffs argue that this section suppresses the content of speech in violation of the First Amendment.

Bigelow v. Virginia, 421 U. S. 809 (1975) is cited for the proposition that the state cannot restrict advertisements solely because of their content. In *Bigelow*, the Supreme Court overturned the conviction of a Virginia newspaper editor for publishing an advertisement containing information about abortion services available in New York. While observing that advertising "enjoys a degree of First Amendment protection" the Court made clear that not all advertisements are immune from regulation. "Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest." *Id.* at 826. The advertisement was protected by the First Amendment in *Bigelow* because it provided factual information of a clear public interest about activity which "pertained to constitutional interests."

In the present case, neither of those factors are present. An advertisement promoting the sale of drug paraphernalia does not contain factual information in the same sense as an advertisement describing the availability of abortion services. There is certainly no "constitutional interest" in the possession of drug paraphernalia. *Cf. Roe v. Wade*, 410 U.S. 113 (1973).

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) is dispositive of plaintiffs' First Amendment argument. There, the Court upheld a Pennsylvania ordinance forbidding newspapers from carrying purely commercial help wanted advertisements in sex-designated columns. The Court noted that under the ordinance "[d]iscrimination in employment is not only

commercial activity, it is *illegal* commercial activity." *Id.* at 388. The fact that the commercial activity was itself illegal was critical to the Court's holding:

> Any First Amendment interest which might be served by advertising an ordinary commercial purpose and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

Id. at 389. As in *Pittsburgh Press*, the commercial activity in this case is illegal. L.B.991 makes the delivery, possession and use of drug paraphernalia illegal. Clearly the statute's restriction on the advertisement of drug paraphernalia is merely incidental to its proscription. It would be strange indeed to find that the First Amendment protects the solicitation of otherwise criminal activity. The Court in *Pittsburgh Press* made clear that it does not. In short, L.B.991 can constitutionally prohibit the advertisement of what it otherwise proscribes.

E. *The Fourth Amendment.*

Plaintiffs vigorously contend that L.B.991 violates the Fourth Amendment's prohibition of unreasonable searches and seizures. They fear that the statute permits searches without the requisite showing of probable cause. According to plaintiffs, a police officer who sees one of the items listed in section 1 could, without more, seize it. "The real danger of the Act is that it permits searches based upon a police officer's sighting of any article listed in Section 1 which items 'sitting in the air' are not illegal." Plaintiffs Post Trial Brief at 8. This argument completely ignores both the statute's definition of drug paraphernalia and the fourteen factors listed in section 2 which a police

officer must consider in determining if an object is drug paraphernalia. Under the statute, no item "sitting in the air" is paraphernalia. To determine if a particular object is outlawed an officer is compelled by the statute to consider the various elements set out in section 2. When Delaware's Model Drug Paraphernalia Act was challenged on Fourth Amendment grounds, the Court pointed out that:

> Nothing in the Act . . . dilutes the Fourth Amendment probable cause standard and there is no reason to believe that its application will be any more difficult or uncertain in the context of the Act than in the context of any of the other multitude of statutes that proscribe otherwise innocent conduct when accompanied by the intent to commit or facilitate a crime.

Delaware Accessories Trade Assn. v. Gebelein, supra at 17. There is simply nothing in L.B.991 which alters the requirement that searches and seizures must be based upon probable cause.

Nor can there be any serious objection to the forfeiture provisions set out in section 7 of the Act. That section provides for the seizure and forfeiture of all drug paraphernalia. Any question about the constitutionality of civil forfeiture was laid to rest by the Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). In that case, the Court upheld the seizure and forfeiture of a Yacht which was carrying a controlled substance. The seizure occurred without prior notice or hearing and without the lessor even being aware that the lessee was using the vessel for an unlawful purpose. The State of Nebraska has a significant interest in preventing drug abuse. In furtherance of that interest the State may seize and confiscate the instrumentalities which facilitate illicit drug use.

F. *The Commerce Clause.*

It is contended that L.B.991 will unreasonably burden interstate commerce in violation of the commerce clause of the United States Constitution. Article I, Section 8, Clause 3. The applicable law is found in *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970).

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues. . . .

(citations omitted). *Pike* sets out a three tiered inquiry. Does the statute evenhandedly serve a legitimate local public interest; does the legislation have only an incidental affect on interstate commerce; and, does the local public interest justify the statute's impact on interstate commerce.

When this test is applied to L.B.991 it is clear that the statute does not impermissibly burden interstate commerce. The first part of the test is met because the state, in providing for the welfare of its citizens, may legitimately regulate both illicit drugs and drug related devices. *Geiger, supra.* The second tier is met because the statute has only

an incidental affect on interstate commerce. L.B.991 only regulates items which the statute defines as drug paraphernalia; namely, those items which are used, intended for use, or designed for use with a controlled substance. It has no affect on any item which is used in a legitimate manner—plaintiffs concede that practically all drug paraphernalia can be used for some legal purpose. Thus, the definition of drug paraphernalia limits not only the reach of the statute but its impact on interstate commerce. Finally, the Court concludes that the public interest in curtailing the now chronic problem of drug abuse far outweighs the statute's *de minimis* impact on interstate commerce. L.B.991 does not impermissibly burden commerce between the several states.

CONCLUSION

L.B.991 may not be easy to enforce nor is it likely that it will singlehandedly ameliorate the problem of drug abuse. Nonetheless, as it is construed herein, the statute does not run afoul of the Federal Constitution. This Court does not inquire further.

Counsel for the defendants shall prepare and submit a formal decree and judgment in accordance with this Memorandum and submit same to counsel for the plaintiffs for approval as to form only. Said decree and judgment shall be submitted to the Court on or before five (5) days of the date hereof.

Dated this 26th day of September, 1980.

FOOTNOTES

1 This is not an appropriate case for abstention. In *High Ol' Times, Inc. v. Busbee*, 621 F.2d 135 (5th Cir.1980) the Court reversed a district court's decision to abstain in a case challenging the constitutionality of a Georgia paraphernalia statute. The crux of the court's analysis is set out below and is dispositive of the issue here:

> If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction.
>
> We believe that such is the case here; a state court interpretation of the statutes would neither render unnecessary nor substantially modify the federal constitutional question. *Id.* at 140.

(citations omitted).

2. Several of the original plaintiffs were permitted to withdraw from this action prior to the hearing on the merits. The party plaintiffs also include a "John Doe" who purports to represent Nebraska pipe smokers who fear prosecution under the statute.

3. *Neb.Rev.State.* §§ 28-101 and 28-434.

4. For example, legislation similar to L.B.991 has been enacted by Connecticut, Delaware, Florida, Illinois, Indiana, Louisiana, Maryland, New Jersey, New York, and South Carolina. City ordinances seeking to ban drug paraphernalia have been passed in numerous communities including Overland Park, Kansas; Parma, Ohio; Lawrenceville, New Jersey; Antioch, Illinois; and Oyster Bay, New York.

5. In upholding an Overland Park ordinance prohibiting the sale and display of drug paraphernalia, a Kansas district court observed: "The City of Overland Park, in response to a serious problem of drug usage among school children, adopted the challenged ordinance to discourage the promotion and use of drugs by minors." *Cardarella v. City of Overland Park*, No. 86246 p. 2 (Dist. Ct. Kan. 1979).

6. Hearings on L.B.991 before the Judiciary Committee of the Nebraska Legislature (March 11, 1980), at 116.

7. The devices referred to are bongs [see e.g., defendants' exhibit 24] and "power hitters" [defendants' exhibit C-2].

8. It is axiomatic that a legislature may deal with a problem one step at a time and may seek a solution by concentrating on a single area. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955).

9. The plaintiffs contend that the court's due process analysis should employ a "strict scrutiny" rather than a "rational basis" test. The argument is that L.B.991 violates the fundamental rights

protected by the First and Fourth Amendments and therefore the former test is applicable. The notion that strict scrutiny applies where the statute in question prohibits drug paraphernalia is a novel proposition. It is also totally unsupported by the case law. The plaintiffs are unable to point to a single case where a court has construed a drug paraphernalia statute using the standard of review argued for here. Where drug ordinances have been challenged on similar grounds, the courts have consistently applied traditional equal protection analysis. In upholding a drug paraphernalia ordinance in Michigan, Judge Boyle said:

> Where a statute impacts on a fundamental interest, such as voting, or involves a suspect classification, such as race, the Court must carefully scrutinize the legislation to determine whether the state has a compelling interest in the end to be attained and whether the means used are closely congruent to the ends sought.
>
> Where, as here, neither a fundamental right nor a suspect classification is involved, traditional equal protection analysis is the standard of review. (citations omitted).

Tobacco Road v. City of Novi, No. 79-7100 p. 5 (E.D.Mich.1979); *see Record Revolution v. City of Parma*, No. C 80-38 (N.D.Ohio 1980). In the *Parma* case, the plaintiff raised essentially the same arguments advance here. In finding the Ohio ordinance constitutional, Judge Manos pointed out that "traditional equal protection analysis provides the standard of review." *Id.* at 24.

10. Plaintiffs' exhibit 141 is an apple which was carved in such a manner that it could be used as a smoking device. Similar surgery was performed on a soft drink can, plaintiffs' exhibit 140.

11. In passing it is noted that other courts have grappled with the definition of drug paraphernalia. The Eighth Circuit Court of Appeals has said that paraphernalia "has become a standard vocabulary work in the vernacular of the drug community. . . ." *United States v. Johnson*, 541 F.2d 1311, 1315 (8th Cir. 1976). An Iowa court found an ordinance which attempted to define paraphernalia with reference to certain items unconstitutionally vague. *See Magnani v. City of Ames*, No. 80-229-A (S.D.Iowa1980). This Court is of the opinion that the only constitutionally permissible way to define drug paraphernalia is not by reference to any identifiable set of objects but by considering the intent of the defendant vis a vis the item in question. It is constitutional folly to attempt to isolate certain items as drug paraphernalia *per se* because the vast majority of items used with controlled substances also have innocent uses. Thus, to meet the bedrock constitutional requirement of notice, the definition of paraphernalia must be grounded not in the intrinsic qualities of the suspected object but in the intent of the alleged offender. In short, L.B.991's definition of drug paraphernalia is constitutional because it puts all citizens on notice that *any* object used, intended for use, or designed for use with a controlled substance falls within the ambit of the statute. One can determine and must avoid what the statute forbids.

12. The plaintiffs offer the following example: A merchant sells a wooden pipe to "A". "A" uses the pipe for smoking

marijuana, as he intended to do when he made the purchase. That intention of "A" translates the pipe into drug paraphernalia for purposes of invoking the sanctions of this law against the merchant. Plaintiffs' Pre-trial Brief at 31.

13. L.B.991 specifically provides for severability:

> Section 10. If any section in this Act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof.

There is ample authority for severing the unconstitutional section of a statute while allowing the constitutional portion to stand. *See e.g. Champlin Refining Co. v. Corporation Commission,* 286 U.S. 210 (1932); *Dorchy v. Kansas,* 264 U.S. 286 (1924).

14. The term "legitimate" also appears in factor (13):

> The existence and scope of any *legitimate* use for the object in the community. . . .

Legitimate in this case refers not to a person, i.e., a supplier, as it did in factor (11) but to the way an object is used. Objects, of course, are inately neither legitimate not illegitimate. To describe the use of an object as "legitimate" is to say nothing more than it has a lawful use. To similarly describe a person conjures up a variety of images some of which invite discrimination. "Legitimate" is acceptable in factor (13) but not in (11) because the statute provides sanctions against people not objects.

15. For an analysis of how L.B.991 impacts on the First Amendment see pages 14-16 *infra.*

16. See note 13 *supra.* The reasonably should know language is found in sections 4 and 6 of the statute and applies by implication to section 5.

17. A hookah is an ornate pipe. See plaintiffs' exhibit 107.

18. *See e.g.,* 15 *U.S.C.* § 78 (dealing with the Foreign Corrupt Practices Act); 15 *U.S.C.* § 2614 (dealing with toxic substances); *Neb.Rev.Stat.* § 28-417(g) (dealing with controlled substances); *Neb.Rev.Stat.* § 28-515(3) (dealing with tele-communications).

19. The Court noted, however, that it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines* at 340.

20. It is possible that L.B.991 will have a chilling effect on First Amendment freedoms. For example, there is the danger that a publication advertising drug paraphernalia which originates in a state where the paraphernalia is legal will be offered for sale in Nebraska. To avoid prosecution in this state an advertiser might well decide to forego his solicitation. It is not difficult to imagine other circumstances where the statute might dissuade the expression of protected speech. Nevertheless, the statute is susceptible to a narrow interpretation by state courts and thus should not be declared facially unconstitutional here. *See Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973). Section 6 could logically be construed as applying only to advertisements which indicate that paraphernalia is available in Nebraska.

APPENDIX C

LB991

LEGISLATURE OF NEBRASKA
EIGHTY-SIXTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 991

FINAL READING

Introduced by Law Enforcement and Justice Advisory Committee, Nichol, 48, Chmn.; Stoney, 4; Venditte, 7; Reutzel, 15; Wagner, 41; Pirsch, 10

Read first time February 27, 1980

Rereferred to Judiciary

A BILL

FOR AN ACT to amend sections 28-101 and 28-431, Revised Statutes Supplement, 1978, relating to drugs and narcotics; to define a term; to prohibit the sale and use of drug paraphernalia as prescribed; to provide a penalty; to provide duties for the Revisor of Statutes; to provide for severability; to repeal the original sections; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. *As used in this act, unless the context otherwise requires, drug paraphernalia shall mean all equipment, products, and materials of any kind which are used, intended for use, or designed for use, in manufacturing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this act or the Uniform Controlled Substances Act. It shall include, but not be limited to, the following:*

(1) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, used, intended for use, or designed for use in cutting controlled substances;

(2) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;

(3) Hypodermic syringes, needles, and other objects used, intended for use, and designed for use in parenterally injecting controlled substances into the human body; and

(4) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, which shall include but not be limited to the following:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) Water pipes;

(c) Carburetion tubes and devices;

(d) Smoking and carburetion masks;

(d) Roach clips, meaning objects used to hold burning material, such as a marijuana cigarette, which has become too small or too short to be held in the hand;

(f) Miniature cocaine spoons, and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chillums;

(l) Bongs; and

(m) Ice pipes or chillers.

Sec. 2. *In determining whether an object is drug paraphernalia, a court or other authority shall consider, in addition to all other logically relevant factors, the following:*

(1) Statements by an owner or by anyone in control of the object concerning its use;

(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;

(3) The proximity of the object, in time and space, to a direct violation of this act;

(4) The proximity of the object to any controlled substance;

(5) The existence of any residue of a controlled substance on the object;

(6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to any person whom he or she knows, or should reasonably know, intends to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use as drug paraphernalia;

(7) Instructions, oral or written, provided with the object concerning its use;

(8) Descriptive materials accompanying the object which explain or depict its use;

(9) National and local advertising concerning its use;

(10) The manner in which the object is displayed for sale;

(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(12) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise;

(13) The existence and scope of any legitimate use for the object in the community; and

(14) Expert testimony concerning its use.

Sec. 3. *(1) It shall be unlawful for any person to use, or to possess with intent to use, drug paraphernalia to manufacture, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this act.*

(2) Any person who violates this section shall be guilty of an infraction.

Sec. 4. *(1) It shall be unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to manufacture, inject, ingest, inhale, or otherwise be used to introduce into the human body a controlled substance in violation of this act.*

(2) Any person who violates this section shall be guilty of a Class II misdemeanor.

Sec. 5. *Any person eighteen years of age or older who violates section 4 of this act by delivering drug para-*

phernalia to a person under eighteen years of age who is at least three years his or her junior shall be guilty of a Class I misdemeanor.

Sec. 6. *(1) It shall be unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.*

(2) Any person who violates this section shall be guilty of a Class III misdemeanor.

Sec. 7. That section 28-431, Revised Statutes Supplement, 1978, be amended to read as follows:

28-431. (1) The following shall be seized without warrant by an officer of the Division of Drug Control or by any peace officer, and the same shall be subject to forfeiture: (a) All controlled substances which have been manufactured, distributed, dispensed, acquired, or possessed in violation of the provisions of this article; (b) all raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, administering, delivering, importing, or exporting any controlled substance in violation of the provisions of this article; (c) all property which is used, or is intended for use, as a container for property described in subdivisions (a) and (b) of this subsection; (d) all conveyances including aircraft, vehicles, or vessels which are used, or intended for use, in transporting any controlled substance with intent to manufacture, distribute, deliver, dispense, export, or import such controlled substance: *Provided,* any conveyance seized including aircraft, vehicles, or vessels shall be released by the proper court upon a showing by the owner of record of such

conveyance that the owner had no knowledge that such conveyance was being used in violation of any provision of this article; and (e) books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use in violation of the provisions of this article; *and (f) all drug paraphernalia defined in section 1 of this act.*

(2) Any conveyance, including aircraft, vehicles, or vessels, which is used, or intended for use to transport any property described in subdivisions (a) and (b) of subsection (1) of this section is hereby declared to be a common nuisance, and any peace officer having probable cause to believe that such conveyance is so used or intended for such use shall make a search thereof with or without a warrant.

(3) All property seized without a search warrant shall not be subject to a replevin action and: (a) Shall be kept by the property division of the law enforcement agency which employs the officer who seized such property for so long as it is needed as evidence in any trial; and (b) when no longer required as evidence, all property described in subdivision (1) (e) of this section shall be disposed of on order of a court of record of this state in such manner as the court in its sound discretion shall direct, and all property described in subdivisions (a), (b), and (c), *and* (f) of subsection (1) of this section, that has been used or is intended to be used in violation of the provisions of this article, when no longer needed as evidence shall be destroyed by the law enforcement agency holding the same or the Bureau of Examining Boards or turned over to the custody of the department; *Provided,* that a law enforcement agency may keep a small quantity of the property described in subdivisions (a), (b), and (c), *and* (f) of subsection (1) of this section for training

purposes or use in investigations; *and provided further,* that any large quantity of property described in subdivisions (a), (b), and (c), *and* (*f*) of subsection (1) of this section, whether seized under a search warrant or validly seized without a warrant, may be disposed of on order of a court of record of this state in such manner as the court in its sound discretion shall direct. Such an order may be given only after a proper laboratory examination and report of such property has been completed and after a hearing has been held by the court after notice to the defendant of the proposed disposition of the property. The findings in such court order as to the nature, kind, and quantity of the property so disposed of may be accepted as evidence at subsequent court proceedings in lieu of the property ordered destroyed by the court order.

(4) When any conveyance, including aircraft, vehicles, or vessels, is seized under subdivision (1) (d) of this section, the person seizing the same shall within five days thereafter cause to be filed in the district court of the county in which seizure was made a complaint for condemnation of the conveyance seized. The proceedings shall be brought in the name of the state by the county attorney of the county in which the conveyance was seized. The complaint shall describe the conveyance, state the name of the owner if known, allege the essential elements of the violation which is claimed to exist, and shall conclude with a prayer of due process to enforce the forfeiture. Upon the filing of such a complaint, the court shall promptly cause process to issue to the sheriff, commanding him *or her* to take possession of the conveyance described in the complaint and to hold the same for further order of the court. The sheriff shall at the time of taking possession serve a copy of the process upon the owner of the con-

veyance in person or by registered or certified mail at his *or her* last-known address; *Provided,* any conveyance seized including aircraft, vehicles, or vessels shall be released by the proper court upon a showing by the owner of record of such conveyance that such owner had no knowledge that such conveyance was being used in violation of any provision of this article. At the expiration of twenty days after such seizure by the sheriff, if no claimant has appeared to defend such complaint, the court shall order the sheriff to dispose of the seized conveyance.

Any person having an interest in the conveyance proceeded against, or any person against whom a civil or criminal liability would exist if such conveyance is in violation of the provisions of this article may, within twenty days following the sheriff's taking of possession, appear and file answer or demurrer to the complaint. The answer or demurrer shall allege the interest or liability of the party filing it. In all other respects the issue shall be made up as in other civil actions. If, after a trial, or upon hearing before the court without a trial when no claimant has appeared to defend the complaint, it shall appear beyond a reasonable doubt that such conveyance was used or intended for use in transporting a controlled substance with intent to manufacture, distribute, deliver, dispense, export, or import such controlled substance, such conveyance shall be ordered sold.

When any conveyance is ordered sold by the court, the proceeds from the sale less the legal costs and charges shall be paid to the county treasurer for disposition in the manner provided for disposition of license money under the Constitution of this state. Whenever the condemnation of the conveyance is decreed, the court shall allow the claim of any claimant to the extent of such claimant's interest, for remission or mitigation of such forfeiture if such

claimant proves to the satisfaction of the court (1) that he *or she* has not committed or caused to be committed an offense in violation of the provisions of this article and has no interest in any controlled substance referred to in this article; (2) that he *or she* has an interest in such conveyance as owner or lienor or otherwise, acquired by him *or her* in good faith; and (3) that he *or she* at no time had any knowledge or reason to believe that such conveyance was being or would be used in, or to facilitate, the violation of the provisions of this article.

When a decree of condemnation is entered against any conveyance, court costs and fees and storage and other proper expenses shall be charged against the person, if any, intervening as claimant of the conveyance. When a conveyance is sold under court order, the officer holding the sale shall make a return to the court showing to whom the conveyance was sold and for what price. This return together with the court order shall authorize the county clerk to issue a title to the purchaser of the conveyance if such conveyance requires such title under the laws of this state.

Sec. 8. That section 28-101, Revised Statutes Supplement, 1978, be amended to read as follows:

28-101. Sections 28-101 to 28-1335 *and sections 1 to 7 of this act* shall be known as the Nebraska Criminal Code.

Sec. 9. *The Revisor of Statutes shall assign this act as a part of article 4 within Chapter 28.*

Sec. 10. *If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof.*

Sec. 11. That original sections 28-101 and 28-431, Revised Statutes Supplement, 1978, are repealed.

Sec. 12. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.

APPENDIX D

Ordinances of the City of Parma, Ohio

ORDINANCE NO. 242-79

12/17/79

By: Doris Krawczyk, Gerald Boldt, Frank Houdek, Evelyn Kopchak, Jack Krise, Victor Labutta, Joseph Molodec, William Obuch

AN ORDINANCE ENACTING NEW SECTIONS 620.01(dd) AND 620.04 TO THE CODIFIED ORDINANCES OF THE CITY OF PARMA, PROHIBITING THE SALE OF DRUG RELATED PARAPHERNALIA, AND DECLARING AN EMERGENCY

WHEREAS, this Council has become aware of and is concerned over the general proliferation of "head shops" engaged in the sale of paraphernalia associated with drug use; and

WHEREAS, this Council finds that such establishments serve only to entice young people to abuse substances which are known to be harmful and unsafe for human consumption; and

WHEREAS, this Council finds that this situation has created a problem of such large proportion as to necessitate further legislation on the subject; Now, Therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF PARMA, STATE OF OHIO:

Section 1. That Codified Ordinance 620.01, as enacted by Ordinance 228-75, passed February 2, 1976, is hereby amended by adding the following language:

"620.01 DEFINITIONS.

. . .

(dd) (1) "Drug Paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this Chapter. It includes, but is not limited to:

(A) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

(B) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

(C) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

(D) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

(E) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(F) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

(G) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marihuana;

(H) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(I) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(J) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

(K) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

(L) Objects used, intended for use, or designed for use in ingesting, inhaling, or

otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body, such as:

(i) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(ii) Water Pipes;

(iii) Carburetion tubes and devices;

(iv) Smoking and carburetion masks;

(v) Roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hands;

(vi) Miniature cocaine spoons, and cocaine vials;

(vii) Chamber pipes;

(viii) Carburetor pipes;

(ix) Electric pipes;

(x) Air-driven pipes;

(xi) Chillums;

(xii) Bongs;

(xiii) Ice pipes or chillers;

2. In determining whether an object is "Drug paraphernalia," a court or other authority should consider, in addition to all other logically relevant factors, the following:

(A) Statements by an owner or by anyone in control of the object concerning its use;

(B) Prior convictions, if any, of an owner, or of anyone in control of the object, under any City, State, or Federal law relating to any controlled substance;

(C) The proximity of the object, in time and space, to a direct violation of this Chapter;

(D) The proximity of the object to controlled substances;

(E) The existence of any residue of controlled substances on the object;

(F) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Chapter; the innocence of an owner or of anyone in control of the object, as to a direct violation of this Chapter shall not prevent a finding that the object is intended for use, or designed for use as "Drug paraphernalia;"

(G) Instructions, oral or written, provided with the object concerning its use;

(H) Descriptive materials accompanying the object which explain or depict its use;

(I) National and local advertising concerning its use;

(J) The manner in which the object is displayed for sale;

(K) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(L) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(M) The existence and scope of legitimate uses for object in the community;

(N) Expert testimony concerning its use.

. . ."

Section 2. That there is hereby enacted a new section 620.04 of the Codified Ordinances of the City of Parma which shall read as follows:

"620.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG PARAPHERNALIA.

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(b) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, com-

pound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(c) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(d) Any person 18 years of age or over who violates paragraph (b) by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a special offense.

(e) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies and other persons whose conduct was in accordance with Ohio R.C. Chapters 3719, 4715, 4729, 4731 and 4741. This section shall not be construed to prohibit any possession, manufacture, or use of hypodermics made lawful by Section 620.09 of the Codified Ordinances.

(f) Any drug paraphernalia used in violation of this section shall be seized and forfeited to the Municipality.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(h) Whoever violates any of the provisions of paragraphs (a), (b), or (c) is guilty of a misdemeanor

of the second degree. If the offender has previously been convicted of a violation of paragraphs (a), (b), or (c), any subsequent violation of the same paragraph is a misdemeanor of the first degree. Whoever violates any of the provisions of paragraph (d) is guilty of a misdemeanor of the first degree."

Section 3. That Section 620.04 of the Codified Ordinances, as enacted by Ordinance 228-75, passed February 2, 1976, be, and hereby it is, repealed.

Section 4. That this Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public health, safety and welfare of the City of Parma, and for the further reason that sale and use of drug paraphernalia is a presently-existing and serious danger to youths which requires immediate regulation, and this Ordinance shall become immediately effective upon receiving the affirmative vote of two-thirds of all members elected to Council and approval of the Mayor, otherwise from and after the earliest period allowed by law.

Passed: January 7, 1980 /s/ Kenneth G. Kuczma
President of Council

Attest: /s/ Bernard J. Survoy
Clerk of Council

Approved: January 9, 1980

Filed With
the Mayor: January 9, 1980 /s/ John Petruska
Mayor, City of Parma, Ohio

ORDINANCE NO. 103-80

By: Doris Krawczyk

AN ORDINANCE AMENDING A PORTION OF SECTION 1 AND SECTION 2 OF ORDINANCE NO. 242-79, MORE SPECIFICALLY SECTION 620.01(dd) 2. (K) AND SECTION 620.04(b) RELATIVE TO DRUG PARAPHERNALIA

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF PARMA, STATE OF OHIO

Section 1. That a portion of Section 1 of Ordinance No. 242-79, passed January 7, 1980, more specifically Section 620.01(dd) 2.(K), which presently reads as follows:

"620.01 DEFINITIONS.

(dd) . . .

2. . . .

(K) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

. . ."

is hereby repealed.

Section 2. That a portion of Section 2 of Ordinance No. 242-79, passed January 7, 1980, more specifically Section 620.04(b), which presently reads as follows:

"620.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG PARAPHERNALIA.

. . .

(b) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture

with intent to deliver or sell, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

. . ."

is hereby amended to read as follows:

"620.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG PARAPHERNALIA.

• • •

(b) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia, knowing that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

. . ."

Section 3. That this Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public health, safety, and welfare of the City of Parma, and for the further reason that it is immediately necessary to bring our ordinance in compliance with Federal constitutional standards as enunciated by the Federal District Court, and this Ordinance shall become effective immediately upon receiving the affirmative vote of two-thirds of all members elected to Council

and approval of the Mayor, otherwise from and after the earliest period allowed by law.

Passed: May 5, 1980 /s/ Kenneth G. Kuczma
President of Council

Attest: /s/ Bernard J.
Survoy
Clerk of Council

Approved: May 7, 1980

Filed With
the Mayor: May 7, 1980 /s/ John Petruska
Mayor, City of Parma, Ohio

APPENDIX E

Ordinances of the City of Lakewood, Ohio

ORDINANCE NO. 5-80

By: Graham, McBride, Salmon, Wendling, Brown, Chinnock, Gallagher

AN EMERGENCY ORDINANCE enacting new Subsection 513.01 (cc) of the General Offenses Code of the Codified Ordinance of the City of Lakewood and amending Section 513.04 of the General Offenses Code of the Codified Ordinance of the City of Lakewood relating to the prohibiting of drug related paraphernalia.

WHEREAS, this Council has become aware of and is concerned over the general proliferation of "head shops" engaged in the sale of paraphernalia associated with drug use; and

WHEREAS, this Council finds that such establishments serve only to entice young people to abuse substances which are known to be harmful and unsafe for human consumption; and

WHEREAS, this Ordinance constitutes an emergency measure providing for the immediate preservation of the public safety and welfare and for the usual daily operation of a municipal department; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF LAKEWOOD, STATE OF OHIO:

Section 1. That the General Offenses Code of the Codified Ordinance of the City of Lakewood be supplemented by an acting new Subsection 513.01 (cc) of the General Offenses Code of the Codified Ordinance of the City of Lakewood which shall read as follows:

513.01 DEFINITIONS.

(cc) (1) "Drug Paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this Chapter. It includes, but is not limited to:

(A) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

(B) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

(C) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

(D) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

(E) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(F) Diluents and adulterants such asquinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

(G) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;

(H) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(I) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(J) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

(K) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in paranterally injecting controlled substances into the human body;

(L) Objects used, intended for use, or designed for use in ingesting, inhaling, or

otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:

(i) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(ii) Water pipes;

(iii) Carburetion tubes and devices;

(iv) Smoking and carburetion masks;

(v) Roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

(vi) Miniature cocaine spoons, and cocaine vials;

(vii) Chamber pipes;

(viii) Carburetor pipes;

(ix) Electric pipes;

(x) Air-driven pipes;

(xi) Chillums;

(xii) Bongs;

(xiii) Ice pipes or chillers.

(2) In determining whether an object is "Drug paraphernalia," a court or other authority should consider, in addition to all other logically relevant factors, the following:

(A) Statements by an owner or by anyone in control of the object concerning its use;

(B) Prior convictions, if any, of an owner, or of anyone in control of the object, under any City, State, or Federal law relating to any controlled substance;

(C) The proximity of the object, in time and space, to a direct violation of this Chapter;

(D) The proximity of the object to controlled substances;

(E) The existence of any residue of controlled substances on the object;

(F) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Chapter; the innocence of an owner or of anyone in control of the object, as to a direct violation of this Chapter shall not prevent a finding that the object is intended for use, or designed for use as "Drug paraphernalia;"

(G) Instructions, oral or written, provided with the object concerning its use;

(H) Descriptive materials accompanying the object which explain or depict its use;

(I) National and local advertising concerning its use;

(J) The manner in which the object is displayed for sale;

(K) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(L) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(M) The existence and scope of legitimate uses for the object in the community;

(N) Expert testimony concerning its use.

Section 2. That Section 513.04 of the General Offenses Code of the Codified Ordinance of the City of Lakewood now reading as follows:

513.04 POSSESSING DRUG ABUSE INSTRUMENTS.

(a) No person shall knowingly make, obtain, possess or use any instrument, article or thing whose customary and primary purpose is for the administration or use of a dangerous drug, other than marijuana, when the instrument involved in a hypodermic or syringe, whether or not of crude of extemporized manufacture or assembly, and the instrument, article or thing involved has been used by the offender to unlawfully administer or use a dangerous drug, other than marijuana, or to prepare a dangerous drug, other than marijuana, for unlawful administration or use.

(b) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies and other persons whose conduct was in accordance with Ohio R.C. Chapters 3719, 4715, 4729, 4731 and 4741.

(c) Whoever violates this section is guilty of possessing drug abuse instruments, a misdemeanor of the

second degree. If the offender has previously been convicted of a drug abuse offense, violation of this section is a misdemeanor of the first degree.

shall be and the same is hereby amended to read as follows:

513.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG PARAPHERNALIA.

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(b) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(c) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(d) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies and other persons whose conduct was in accordance with

Ohio R.C. Chapters 3719, 4715, 4729, 4731 and 4741. This section shall not be construed to prohibit any possession, manufacture, or use of hypodermics made lawful by Section 513.04 of the General Offenses Code of the Codified Ordinances.

(e) Any drug paraphernalia used in violation of this section shall be seized and forfeited to the Municipality.

(f) If any porvision (sic) of this section or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(g) Whoever violates any of the provisions of paragraphs (a), (b), or (c) is guilty of a misdemeanor of the second degree. If the offender has previously been convicted of a violation of paragraphs (a), (b), or (c), any subsequent violation of the same paragraph is a misdemeanor of the first degree.

Section 3. That this Ordinance is hereby declared to be an emergency measure for the reasons stated in the preamble hereof and provided it receives the affirmative vote of two-thirds of all members elected to Council, it shall take effect and be in force immediately upon its adoption and approval by the Mayor; otherwise, it shall take effect and be in force from and after the earliest period allowed by law.

Adopted: January 21, 1980 /s/ Thomas O. McBride
President

/s/ Grace Reynolds
Clerk

Approved: January 22, 1980 /s/ Anthony Sinagra
Mayor

ORDINANCE NO. 29-80

By: Gallagher, Graham, McBride, Salmon, Wendling, Brown, Chinnock

AN EMERGENCY ORDINANCE amending Subsection (cc)(2) of Section 513.01 of the General Offenses Code, and amending and supplementing Section 513.04 of the General Offenses of the Codified Ordinances of the City of Lakewood relating to the prohibiting of drug related paraphernalia.

WHEREAS, this Council enacted Ordinance No. 5-80 on January 21, 1980 in response to its concern over the general proliferation of head shops engaged in the sale of paraphernalia associated with drug use; and

WHEREAS, this Council authorized the Director of Law to file an Amicus Brief in the case captioned *Record Revolution No. 6 v. City of Parma, et al.*, being case no. C80-38 in the U.S. District Court for the Northern District of Ohio Eastern Division, and

WHEREAS, the Court has rendered a decision concluding that the Parma and Lakewood Ordinances are constitutional as construed in the Court's opinion, and

WHEREAS, this Council is desirous of amending the Lakewood Ordinance to conform with the Court's opinion, and

WHEREAS, this Ordinance constitutes an emergency measure providing for the immediate preservation of the public safety and welfare and for the usual daily operation of a municipal department; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF LAKEWOOD, STATE OF OHIO:

Section 1. That Subsection (cc) (2) of Section 513.01 of the General Offenses Code of the Codified Ordinances now reading as follows:

513.01 (cc) (2) DEFINITIONS.

In determining whether an object is "Drug paraphernalia," a Court or other authority should consider, in addition to all other logically relevant factors, the following:

(A) Statements by an owner or by anyone in control of the object concerning its use;

(B) Prior convictions, if any, of an owner, or of anyone in control of the object, under any City, State, or Federal law relating to any controlled substance;

(C) The proximity of the object, in time and space, to a direct violation of this Chapter;

(D) The proximity of the object to controlled substances;

(E) The existence of any residue of controlled substances on the object;

(F) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Chapter; the innocence of an owner or of anyone in control of the object, as to a direct violation of this Chapter shall not prevent a finding that the object is intended

for use, or designed for use as "Drug paraphernalia;"

(G) Instructions, oral or written, provided with the object concerning its use;

(H) Descriptive materials accompanying the object which explain or depict its use;

(I) National and local advertising concerning its use;

(J) The manner in which the object is displayed for sale;

(K) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tabacco (sic) products;

(L) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(M) The existence and scope of legitimate uses for the object in the community;

(N) Expert testimony concerning its use.

be and the same is hereby amended to read as follows:

513.01 (cc) (2) DEFINITIONS.

In determining whether an object is "Drug paraphernalia," a Court or other authority should consider, in addition to all other logically relevant factors, the following:

(A) Statements by an owner or by anyone in control of the object concerning its use;

(B) Prior convictions, if any, of an owner, or of anyone in control of the object, under any City, State, or Federal law relating to any controlled substance;

(C) The proximity of the object, in time and space, to a direct violation of this Chapter;

(D) The proximity of the object to controlled substances;

(E) The existence of any residue of controlled substances on the object;

(F) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Chapter; the innocence of an owner or of anyone in control of the object, as to a direct violation of this Chapter shall not prevent a finding that the object is intended for use, or designed for use as "Drug paraphernalia;"

(G) Instructions, oral or written, provided with the object concerning its use;

(H) Descriptive materials accompanying the object which explain or depict its use;

(I) National and local advertising concerning its use;

(J) The manner in which the object is displayed for sale;

(K) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(L) The existence and scope of legitimate uses for the object in the community;

(M) Expert testimony concerning its use.

Section 2. That Section 513.04 of the General Offenses Code of the Codified Ordinances now reading as follows:

513.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG PARAPHERNALIA.

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(b) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia, knowing, or under circumstances where one reasonably should know that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(c) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(d) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies and other persons whose conduct was in accordance with Ohio R.C. Chapters 3719, 4715, 4729, 4731 and 4741. This section shall not be construed to prohibit any possession, manufacture, or use of hypodermics made lawful by Section 513.04 of the General Offenses Code of the Codified Ordinances.

(e) Any drug paraphernalia used in violation of this section shall be seized and forfeited to the Municipality.

(f) If any provision of this section of the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section which can be given effect without the invalid provisions or application, and to this and the provisions of this section are severable.

(g) Whoever violates any of the provisions of paragraphs (a), (b) or (c) is guilty of a misdemeanor of the second degree. If the offender has previously been convicted of a violation of paragraphs (a), (b), or (c), any subsequent violation of the same paragraph is a misdemeanor of the first degree.

be and the same is hereby amended to read as follows:

513.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG PARAPHERNALIA.

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(b) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia, knowing that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(c) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(d) Any person 18 years of age or over who violates paragraph (b) by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a special offense.

(e) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies and other persons whose conduct was in accordance with Ohio R.C. Chapters 3719, 4715, 4729, 4731 and 4741. This section shall not be construed to prohibit any possession, manufacture, or use of hypodermics made lawful by Section 620.09 of the Codified Ordinances.

(f) Any drug paraphernalia used in violation of this section shall be seized and forfeited to the Municipality.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section which can be given effect

without the invalid provision or application, and to this end the provisions of this section are severable.

(h) Whoever violates any of the provisions of paragraphs (a), (b), or (c) is guilty of a misdemeanor of the second degree. If the offender has previously been convicted of a violation of paragraphs (a), (b), or (c), any subsequent violation of the same paragraph is a misdemeanor of the first degree. Whoever violates any of the provisions of paragraph (d) is guilty of a misdemeanor of the first degree.

Section 3. That this ordinance is hereby declared to be an emergency measure for the reasons stated in the preamble hereof and provided it receives the affirmative vote of two-thirds of all members elected to Council, it shall take effect and be in force immediately upon its adoption and approval by the Mayor; and all other ordinances or parts of ordinances inconsistent herewith shall be and are hereby repealed.

Adopted: April 21, 1980 /s/ Thomas O. McBride
President

/s/ Grace Reynolds
Clerk

Approved: April 22, 1980 /s/ Anthony Sinagra
Mayor

APPENDIX F

Ordinance of the City of North Olmsted, Ohio

CITY OF NORTH OLMSTED
ORDINANCE NO. 80-28

By: J. Saringer and R. Wilamosky

AN ORDINANCE ENACTING A NEW SECTION 513.01(bb) AND ENACTING A NEW AND REVISED SECTION 513.04 OF THE CODIFIED ORDINANCES OF THE CITY OF NORTH OLMSTED ENTITLED "POSSESSION OF DRUG ABUSE INSTRUMENTS", AS AMENDED.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF NORTH OLMSTED, COUNTY OF CUYAHOGA AND STATE OF OHIO:

Section 1: That Section 513.01 of the Codified Ordinances of the City of North Olmsted entitled "Definitions" of Chapter 513 entitled "Drug Abuse Control" be and the same is hereby amended by adding thereto a new section under "Definitions" to be known as Section 513.01(bb), which new section shall read as follows:

513.01 DEFINITIONS.

(bb)(1) "Drug Paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise in-

troducing into the human body a controlled substance in violating of this Chapter. It includes, but is not limited to:

(A) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

(B) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

(C) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.

(D) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

(E) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(F) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

(G) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in

otherwise cleaning or refining marijuana;

(H) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(I) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of control substances;

(J) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

(K) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

(L) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body such as:

(i) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(ii) Water pipes;

(iii) Carburetion tubes and devices;

(iv) Smoking and carburetion masks;

(v) Roach clips: meaning objects used to hold burning material, such as a marijuana cigarette that has become too small or too short to be held in the hand;

(vi) Miniature cocaine spoons, and cocaine vials;

(vii) Chamber pipes;

(viii) Carburetor pipes;

(ix) Electric pipes;

(x) Air-driven pipes;

(xi) Chillums;

(xii) Bongs;

(xiii) Ice pipes or chillers;

2. In determining whether an object is "Drug Paraphernalia", a court or other authority should consider, in addition to all other logically relevant factors, the following:

(A) Statements by the owner or by anyone in control of the object concerning its use;

(B) Prior convictions, if any, of an owner, or of anyone in control of the object, under any City, State, or Federal law relating to any controlled substance;

(C) The proximity of the object, in time and space, to a direct violation of this Chapter;

(D) The proximity of the object to control substances;

(E) The existence of any residue of controlled substances on the object;

(F) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object to deliver it to persons whom he knows, or should reasonably know, intends to use the object to facilitate a violation of this Chapter; the innocence of an owner or of anyone in control of the object, as to a direct violation of this Chapter shall not prevent a finding that the object is intended for use, or designed for use as "Drug Paraphernalia";

(G) Instructions, oral or written, provided with the object concerning its use;

(H) Descriptive materials accompanying the object which explain or depict its use;

(I) National and local advertising concerning its use;

(J) The manner in which the object is displayed for sale;

(K) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(L) The existence and scope of legitimate use for the object in the community;

(M) Expert testimony concerning its use.

SECTION 2: That there is hereby enacted a new and revised Section 513.04 of the Codified Ordinances of the City of North Olmsted which new and revised section shall read as follows:

"513.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG ABUSE INSTRUMENTS AND PARAPHERNALIA.

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(b) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia, knowing that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(c) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication, any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement in whole or in part, is to promote the sale of objects designated or intended for use as drug paraphernalia.

(d) Any person eighteen (18) years of age or over who violates Paragraph (b) by delivering drug paraphernalia to a person under eighteen (18) years of age who is at least three (3) years his junior is guilty of a special offense.

(e) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with Ohio Revised Code, Chapters 3719, 4715, 4729, 4731, and 4741. This section shall not be construed to prohibit any possession, manufacture, or use of hypodermics made lawful by Section 513.01 of the Codified Ordinances.

(f) Any drug paraphernalia used in violation of this section shall be seized and forfeited to the Municipality.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(h) Whoever violates any of the provisions of paragraphs (a), (b), or (c), is guilty of a misdemeanor of the second degree. If the offender has previously been convicted of a violation of paragraphs (a), (b), or (c), any subsequent violation of the same paragraph is a misdemeanor of the first degree. Whoever violates any of the provisions of paragraph (d) is guilty of a misdemeanor of the first degree."

SECTION 3: That Section 513.04 of the Codified Ordinances previously enacted be, and hereby it is repealed, and further that any other ordinance or parts of ordinances in conflict herewith are hereby repealed.

SECTION 4: That this Ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed: May 6, 1980
Attest:
/s/ Florence E. Campbell
Clerk of Council

/s/ Dewey H. Limpert
President of Council

Approved: May 6, 1980
/s/ Robert W. Swietyniowski
Mayor

APPENDIX G

Model Drug Paraphernalia Act

MODEL DRUG PARAPHERNALIA ACT
Drafted by the
Drug Enforcement Administration
of the
United States Department of Justice
August, 1979
With
Prefatory Note and Comments

MODEL DRUG PARAPHERNALIA ACT

Prefatory Note

The Uniform Controlled Substances Act, drafted by the National Conference of Commissioners on Uniform State Laws, has been enacted by all but a handful of states. The Uniform Act does not control the manufacture, advertisement, sale or use of so-called "Drug Paraphernalia." Other state laws aimed at controlling Drug Paraphernalia are often too vaguely worded and too limited in coverage to withstand constitutional attack or to be very effective. As a result, the availability of Drug Paraphernalia has reached epidemic levels. An entire industry has developed which promotes, even glamorizes, the illegal use of drugs by adults and children alike. Sales of Drug Paraphernalia are reported as high as three billion dollars a year. What was a small phenomenon at the time the Uniform Act was drafted has now mushroomed into an industry so well-entrenched that it has its own trade magazines and associations.

This Model Act was drafted, at the request of state authorities, to enable states and local jurisdictions to cope

with the paraphernalia problem. The Act takes the form of suggested amendments to the Uniform Controlled Substances Act. The Uniform Act is extremely well-organized. It contains a definitional section, an offenses and penalties section, a civil forfeiture section, as well as miscellaneous sections on administration and enforcement. Instead of creating separate, independent paraphernalia laws, it seems desirable to control Drug Paraphernalia by amending existing sections of the Uniform Controlled Substances Act.

Article I provides a comprehensive definition of the term "Drug Paraphernalia" and includes particular descriptions of the most common forms of paraphernalia. Article I also outlines the more relevant factors a court or other authority should consider in determining whether an object comes within the definition.

Article II sets out four criminal offenses intended to prohibit the manufacture, advertisement, delivery or use of Drug Paraphernalia. The delivery of paraphernalia to a minor is made a special offense. Article II clearly defines what conduct is prohibited, and it specifies what criminal state of mind must accompany such conduct.

ARTICLE I

(Definitions)

SECTION (insert designation of definitional section) of the Controlled Substances Act of this State is amended by adding the following after paragraph (insert designation of last definition in section):

"( ) The term 'Drug Paraphernalia' means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing,

testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this Act (meaning the Controlled Substances Act of this State). It includes but is not limited to:

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marihuana;

(8) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(9) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

(11) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) Water pipes;

(c) Carburetion tubes and devices;

(d) Smoking and carburetion masks;

(e) Roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(f) Miniature cocaine spoons, and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chillums;

(l) Bongs;

(m) Ice pipes or chillers;

"In determining whether an object is Drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;

(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any State or Federal law relating to any controlled substance;

(3) The proximity of the object, in time and space, to a direct violation of this Act;

(4) The proximity of the object to controlled substances;

(5) The existence of any residue of controlled substances on the object;

(6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this Act shall not prevent a finding that the object is intended for use, or designed for use as Drug paraphernalia;

(7) Instructions, oral or written, provided with the object concerning its use;

(8) Descriptive materials accompanying the object which explain or depict its use;

(9) National and local advertising concerning its use;

(10) The manner in which the object is displayed for sale;

(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(12) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(13) The existence and scope of legitimate uses for the object in the community;

(14) Expert testimony concerning its use."

ARTICLE II

(Offenses and Penalties)

SECTION (designation of offenses and penalties section) of the Controlled Substances Act of this State is amended by adding the following after (designation of last substantive offense):

"SECTION (A) (Possession of Drug Paraphernalia)

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance

in violation of this Act. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

"SECTION (B) (Manufacture or Delivery of Drug Paraphernalia)

It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

"SECTION (C) (Delivery of Drug Paraphernalia to a Minor)

Any person 18 years of age or over who violates Section (B) by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a special offense and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

"SECTION (D) (Advertisement of Drug Paraphernalia)

It is unlawful for any person to place in any newspaper, magazine, handbill, or other publica-

tion any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this section is guilty of a crime and upon conviction may be imprisoned for not more than ( ), fined not more than ( ), or both."

ARTICLE III

(Civil Forfeiture)

SECTION (insert designation of civil forfeiture section) of the Controlled Substances Act of this State is amended to provide for the civil seizure and forfeiture of drug paraphernalia by adding the following after paragraph (insert designation of last category of forfeitable property):

"( ) all drug paraphernalia as defined by Section ( ) of this Act."

ARTICLE IV

(Severability)

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

COMMENT [ARTICLE I]

Drug paraphernalia laws are most often attacked because they are too vaguely worded. They seldom explain

what is meant by the term paraphernalia. They do not indicate whether it is the use, or the possession, or the sale of paraphernalia that is prohibited. Moreover, they are usually silent on the criminal state of mind that must accompany the prohibited conduct. This deprives an individual of fair warning as to what the law forbids. It also vests too much discretion in authorities to determine what property and what activities are controlled.

DEFINITION OF DRUG PARAPHERNALIA

Article I of the Model Act, in contrast, defines "drug paraphernalia" as equipment, products, and materials used, intended for use, or designed for use, essentially, to produce, package, store, test or use illicit drugs. The words "equipment, products and materials" should be interpreted according to their ordinary or dictionary meanings. They can apply to many forms of movable, tangible property. Real property, conveyances, monies, documents and intangible property are, on the other hand, not meant to be included within these terms.

Although this definition may appear too general in its wording, or too broad in its scope, there are so many forms of drug paraphernalia that any attempt to define the term in more specific language would guarantee major loopholes in the Act's coverage. The courts have repeatedly recognized that there are practical limitations in drafting legislation. Where the subject matter of a statute does not lend itself to exact description, the use of general language does not make the statute unconstitutionally vague. *United States v. Petrillo*, 332 U.S. 1, 67 S.Ct. 1538 (1947). And see *United States v. Ryan*, 284 U.S. 167, 52 S.Ct. 65 (1931).

To insure that innocently possessed objects are not classified as drug paraphernalia, Article I makes the knowl-

edge or criminal intent of the person in control of an object a key element of the definition. Needless to say, inanimate objects are neither "good" nor "bad," neither "lawful" nor "unlawful." Inanimate objects do not commit crimes. But, when an object is controlled by people who use it illegally, or who intend to use it illegally, or who design or adapt it for illegal use, the object can be subject to control and the people subjected to prosecution. Article I requires, therefore, that an object be used, intended for use, or designed for use in connection with illicit drugs before it can be controlled as drug paraphernalia.

Hinging the definition of drug paraphernalia on a specific intent to violate, or to facilitate a violation of, the drug laws also provides "fair warning" to persons in possession of property potentially subject to this Act. A statute is not unconstitutionally vague, if it embodies a specific intent to violate the law. *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 72 S.Ct. 329 (1952); *Screws v. United States,* 325 U.S. 91, 65 S.Ct. 1031 (1945).

Consider the application of Article I to a spoon, a hypodermic syringe, and a length of surgical tubing. Each object has legitimate uses in the community. None is specifically designed for illegal use. Thus, when these objects are manufactured, delivered and possessed in lawful commerce, they are not considered paraphernalia. But, if these same objects are assembled and used by an addict to illegally melt heroin and inject it into his body, they become drug paraphernalia. As such they become forfeitable under Article III, and the addict becomes subject to prosecution under Section A of Article II.

Actual use of an object to produce, package, store, test or use illicit drugs need not always be shown. An object is considered to be drug paraphernalia whenever the person in control intends it for use with illicit drugs. This intent

may be a generalized one, not necessarily pinpointing a specific time and place of future use. See *Palmer v. State*, 14 Md.App. 159, 286 A.2d 572 (1972). It can be proved directly such as by admissions of the person in control, or indirectly through circumstantial evidence. It should be noted that the person in immediate control of an object need not intend to use it personally in connection with drugs. It is enough if he holds the object with the intent to make it available to persons whom he knows will use it illegally. See *United States v. 2265 One-Gallon Paraffined Tin Cans*, 260 F.2d 105 (5th Cir. 1958).

Objects whose sole, or at least dominant purpose is to produce, package, store, test or use illicit drugs are considered to be "designed" for such use. A rebuttable presumption exists that these objects are intended for use for the purpose for which they are designed. See *Israel v. United States*, 63 F.2d 345 (3rd Cir. 1933). As such, they are presumed to be drug paraphernalia. Iomerization devices designed for use in increasing the THC content of marihuana provide a good example.

COMMON FORMS OF DRUG PARAPHERNALIA

Article I includes a detailed description of common forms of property that can fall within the definition of drug paraphernalia if used, intended for use, or designed for use to violate the drug laws. This list is not intended to be inclusive. Several of these descriptions, such as "chillums" and "bongs," may seem foreign to the lay reader. Nevertheless, these terms are part of the jargon of the drug culture and are understood by both users and merchants of drug paraphernalia. They are not unconstitutionally vague. See *Hydgrade Provision Co. v. Sherman*, 266 U.S. 497, 45 S.Ct. 141 (1925).

RELEVANT FACTORS IN CLASSIFYING PARAPHERNALIA

In addition to defining drug paraphernalia and describing the common forms, Article I sets out some of the more relevant factors to consider in determining whether an object is paraphernalia. The listing of these factors in the Model Act is not intended to be peremptory; a court or other authority is not obligated to hear evidence on, or to consider, every listed factor. Rather, the factors have been included to guide law enforcement officers, judges, and juries in their determination of what is controlled. Providing guidance on the practical application of the Act minimizes the risk of arbitrary and discriminatory enforcement, sometimes associated with even the most carefully drafted statutes. See *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676, 88 S.Ct. 1298 (1968).

Conversely, the listing of these factors is not meant to be inclusive. Any logically relevant factor may be considered.

Opposition

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No. 81-415

In The

Supreme Court of the United States

October Term, 1981

THE CASBAH, INC., et al.,

Petitioners,

vs.

CHARLES THONE, et al.,

Respondents.

To the United States Court of Appeals
For the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL L. DOUGLAS
Attorney General of Nebraska
PATRICK T. O'BRIEN
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-4906
Tel: (402) 471-2682
STEVEN E. ACHELPOHL
810 Woodmen Tower
Omaha, NE 68102
Tel: (402) 344-3802
Counsel for Respondents

Of Counsel:
HENRY L. WENDT
Deputy Douglas County Attorney
906 Civic Center
Omaha, NE 68183
Tel: (402) 444-7623

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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STATEMENT OF FACTS

Respondents add to the Statement of Facts in the Petition for Certiorari the following matters. The State of Nebraska adopted a modified version of the Model Drug Paraphernalia Act drafted by the Drug Enforcement Administration of the United States Department of Justice in August of 1979. *See,* Appendix G of the Petition for Certiorari. The Nebraska act differs from the Model Act in some respects. The Nebraska act omits from the definition of drug paraphernalia the words "planting, propagating, cultivating, growing, harvesting, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, and concealing" which are contained in the Model Act. Article I of the Model Act contains definitional sections numbered 1, 2, 3, 4, 5, 8, 9, and 10 which are not included in the

Nebraska act. *See,* Appendices C and G in the Petition for Certiorari.

Both the district court and the United States Court of Appeals for the Eighth Circuit found the Nebraska act to be constitutional. The district court severed two minor provisions from the Nebraska act and found the remainder to be constitutional. *See,* Petition for Certiorari, Appendix B, pp. 38 and 39, dealing with factor 11 of the Nebraska act and pp. A40 through A44 on the reasonably should know standard. The Eighth Circuit Court of Appeals reinstated both provisions upon the cross-appeal of the respondents. The statute makes unlawful the use, possession, manufacture, delivery or advertisement of drug paraphernalia knowing that it is intended to be used in connection with drug abuse. In addition, it imposes a penalty upon delivery of drug paraphernalia to persons under the age of 18 years. *See,* Neb. Rev. Stat. §§ 28-441 through 28-444 (Supp. 1980).

SUMMARY OF ARGUMENT

The Nebraska statute differs from the Model Drug Paraphernalia Act. Thus a decision by this Court may not resolve all questions which may arise under acts based upon or identical to the Model Act. Secondly, the split of authority in the lower courts is illusory at the current juncture and the case is not yet ripe for decision by this Court.

ARGUMENT

Petitioners in their brief in support of their Petition for Writ of Certiorari contend essentially three things. One, that there is a direct conflict between the lower courts; two, that the questions are substantial and of nationwide importance and should be decided by this Court; and finally, that the decision of the Eighth Circuit is in error and should be reversed. We will deal with the arguments presented by the petitioners seriatim.

The major proposition urged by the petitioners for a conflict regards the decision of the Sixth Circuit Court of Appeals in *Record Revolution No. 6, Inc. v. City of Parma, Ohio,* 638 F. 2d 916 (6th Cir. 1980), *vacated and remanded,* 49 U. S. L. W. 3882 (May 26, 1981). We are not aware of any other Circuit Court decisions at this time, although several are pending, which deal with the merits of this issue.

There are a number of reasons why the two decisions do not present a conflict that needs resolution by this Court at the present time. In the first instance, this Court has remanded to the Sixth Circuit Court of Appeals the decision in *Record Revolution v. Parma, supra,* for consideration in light of the passage of a state statute. The possibility exists that the Sixth Circuit may reconsider the decision previously rendered in such a manner that no conflict would then exist between the Sixth and the Eighth Circuits.

A substantial majority of the courts which have considered this issue, when the question involved either the

Model Act or a state statute based upon the Model Act, have found the acts constitutional.[1] A number of courts, including the district court in the present case, have found the acts to be constitutional after severing some portions thought to be impermissible.[2] There also are, of course, a number of cases which have held the statute to be unconstitutional and we will not repeat the citations found in petitioners' brief.

We believe that from these cases it can be seen that there is a developing consensus of opinion at the trial court level finding statutes based upon the Model Act to be constitutional.

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1 *The Casbah, Inc. v. Thone*, No. 80-2033 (8th Cir. June 8, 1981); *Nova Records, Inc. v. Sendak*, 504 F. Supp. 938 (S. D. Ind. 1980), *appeal docketed*, No. 81-1107 (7th Cir. Jan. 22, 1981); *Tobacco Accessories and Novelty Craftsmen Merchants Ass'n v. Treen*, 501 F. Supp. 168 (E. D. La. 1980), *appeal docketed*, No. 80-3854 (5th Cir. Oct. 29, 1980); *Mid-Atlantic Accessories Trade Ass'n v. Maryland*, *supra*, 500 F. Supp. 834 (D. Md. 1980), *appeal docketed*, No. 80-1796 (4th Cir. Nov. 18, 1980); *Delaware Accessories Trade Ass'n v. Gebelein*, 497 F. Supp. 289 (D. Del. 1980); *World Imports, Inc. v. Woodbridge Township*, 493 F. Supp. 428 (D. N. J. 1980), *appeal docketed*, No. 80-1851 (3d Cir. June 30, 1980), *appeal dismissed* (3d Cir. Sept. 17, 1980); *New England Accessories Trade Ass'n, Inc. v. City of Nashua*, Civ. No. 80-530-D (D. N. H. Dec. 8, 1980), *appeal docketed*, No. 80-1822 (1st Cir. April 14, 1981); *Florida Businessmen for Free Enterprise v. City of Hollywood*, No. 80-6157-CIV-HCR (S. D. Fla. Aug. 29, 1980), *appeal docketed*, No. 80-5769 (5th Cir. Sept. 25, 1980); *Levas v. Village of Antioch*, No. 80-C-1574 (D. N. Ill. April 22, 1980), *appeal docketed*, No. 80-1675 (7th Cir. May 14, 1980); *The General Stores, Inc. v. Jeff Bingaman*, No. Civil 81-0330 (D. N. M. June 12, 1981), *appeal docketed*, No. 81-1681 (10th Cir. June 23, 1981).

2 *New England Accessories Trade Ass'n v. Browne*, 502 F. Supp. 1245 (D. Conn. 1980); *Florida Businessmen for Free Enterprise v. Florida*, 499 F. Supp. 346 (N. D. Fla. 1980); *Heijira Corp. v. MacFarlane*, No. 80-2062 (10th Cir. May 5, 1981).

We would urge this Court to deny the petition at the current time and allow the lower courts further time to deal with these issues. The respondents would urge that the grant of certiorari in this case would be premature on the issues to be presented.

A further aspect of the petitioners' argument in support of the granting of certiorari asserts that the questions which are presented are substantial and have nationwide impact. It is undoubted that since the drafting of the Model Act by the Department of Justice, a large number of state and local jurisdictions have adopted drug paraphernalia ordinances or statutes which are designed to curtail the drug abuse currently rampant in the United States. The act under consideration in this case, while admittedly based upon the Model Act provisions, has been significantly narrowed by the Legislature of the State of Nebraska. *See,* Appendices C and G for comparative purposes and the Statement of Facts in this response which set forth the differences between the two acts. Should the Court grant certiorari in the present case, there will remain the question of whether some of the other factors which were not included in the Nebraska act but are included in the Model Act and the acts adopted by other jurisdictions raised some questions not now presented to the Court.

As an example, one need look only at the definitional sections of the Model Act and the Nebraska act. The Nebraska act provides: "[D]rug paraphernalia shall mean all equipment, products, and materials of any kind which are used, intended for use, or designed for use, in manufacturing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in

violation of this act or the Uniform Controlled Substances Act." Neb. Rev. Stat. § 28-439 (Supp. 1980). Much has been made of the all-inclusive nature of the definitional sections of the Model Act. The Model Act includes equipment, products, and materials used, intended for use, or designed for use in "planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance." Clearly, the definition is more all-inclusive than the Nebraska act. In addition, several other factors have been pointed out in other parts of this brief which distinguish the Nebraska act from that of the Model Act. This Court should reserve resolution of those issues until it has before it an act which more closely resembles the Model Act and which will present all of the questions that this Court will be asked at some point to decide concerning these issues.

The multifaceted attack on the constitutionality of the Model Act and the Nebraska act is based upon a hypothesis that an individual will necessarily be required to put themselves in peril by guessing whether or not they are within the terms of the act. But as any number of the district court decisions cited in footnote 1 make clear, no guess is required. The act is very specific in the kinds of items that are prohibited and even more specific in the intent necessary. The mens rea requirement of the drug paraphernalia act refers specifically to the defendant charged and not to some third party whose intention must be divined by the defendant.

This, of course, involves an argument that the statute is vague or overbroad. This Court has addressed itself

to both of those concepts. In *McGowan v. Maryland*, 366 U. S. 420 (1961), this Court, in upholding the constitutionality of a law which required closing retail establishments on Sunday unless those establishments sold merchandise essential to, incidental to, or customarily sold in connection with the operation of bathing beaches and amusement parks, said:

> We believe that business people of ordinary intelligence in the position of appellants' employer would be able to know what exceptions are encompassed by the statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the country.

Id. at 428. We believe the record in this case and the acts themselves clearly demonstrate that there is a developing body of law which makes possible the ready ascertainment of items constituting drug paraphernalia. The Second Circuit recognized this precise issue in *Branche v. County of Westchester* in an opinion issued August 18, 1981, Docket 81-7211. In that case the Second Circuit had reversed the decision of the district court which had found the Westchester county ordinance to be unconstitutional. The court pointed out that the plaintiffs had admitted that some of the items they were selling could be used only for preparing, testing, or ingesting drugs and that those items were plainly within the definitional provisions of the ordinance. The court acknowledged that where a statute could be lawfully applied to certain items that were sold, a facial challenge would be inappropriate. While that opinion deals with the question in terms of standing, we believe that it is a recognition that there is a consensus,

or at least a readily determinable basis upon which people can determine what constitutes drug paraphernalia.

This Court in *Broadrick v. Oklahoma*, 413 U. S. 601 (1973), which dealt with an overbreadth analysis, recognized that "[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Id.* at 613. That limitation, of course, exists in the construction placed upon the statute by the Eighth Circuit Court of Appeals in this case. In reviewing the lower court decisions in this area, it seems clear that the consensus is that the statute may be validly construed by appropriate state courts. Here a facial challenge to the statute is inappropriate when, without construing the statute, the Court may infer from the words of the statute itself that the intent requirement applies to the individual charged with the crime and is not to be determined on the basis of the intent of some third person. That is, the individual charged be he a user, manufacturer, seller or deliverer of the proscribed object must be shown in the prosecution of the case to have intended that the item in question be used in violation of the paraphernalia provisions. It would be irrelevant to determine the intent of the person to whom the item was delivered.

CONCLUSION

The Court should deny the Petition for Certiorari in this case for the reason that not all questions will be presented in the present case, that the split of authority alleged in the petition is illusory and may well not de-

velop as more Circuit Court's of Appeal decide pending paraphernalia cases and the analysis applied to this case by the Eighth Circuit Court of Appeals is correct.

Respectfully submitted,

PAUL L. DOUGLAS
Attorney General of Nebraska

PATRICK T. O'BRIEN
Assistant Attorney General

2115 State Capitol
Lincoln, NE 68509-4906
(402) 471-2682

STEVEN E. ACHELPOHL

810 Woodmen Tower
Omaha, NE 68102
(402) 344-3802

Counsel for Respondents

Of Counsel:

HENRY L. WENDT
Deputy Douglas County Attorney

906 Civic Center
Omaha, NE 68183
(402) 444-7623

Petitioner's Reply Brief

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To The United States Court of Appeals
For the Eighth Circuit

BRIEF IN REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID C. WEINER, Counsel of Record
ARMOND D. BUDISH
HAHN, LOESER, FREEDHEIM, DEAN & WELLMAN
800 National City E. 6th Building
(216) 621-0150
Counsel for Petitioners

Of Counsel:

DONALD B. FIEDLER
300 Keeline Building
Omaha, Nebraska 68102

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

THE CASBAH, INC., et al.,

Petitioners,

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CHARLES THONE, et al.,

Respondents.

To the United States Court of Appeals

For The Eighth Circuit

BRIEF IN REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR CERTIORARI

Petitioners ("the Merchants") filed on August 31, 1981, their Petition for a Writ of Certiorari ("Petition") in this

Court to review the final judgment of the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit"), which judgment upheld in its entirety a law of the State of Nebraska ("Nebraska Law") which had enacted the Model Drug Paraphernalia Act ("Model Act"). The Respondents ("the State") failed to file a Brief in Opposition to the Petition for Certiorari ("Opposition") within the time provided by Rule 22.1 of the Rules of the Supreme Court of the United States. On October 26, 1981, this Court directed the State to file a responsive brief on or before November 25, 1981. The Merchants were served with a copy of the State's Opposition on November 30, 1981.

The Merchants have set forth in the Petition the applicable arguments and precedents which demonstrate that this Court should review and reverse the final judgment of the Eighth Circuit. The

Merchants will not burden the Court by repeating arguments previously made, but will only respond to the new points raised in the State's Opposition.

ARGUMENT

I. THE JUDGMENT OF THE EIGHTH CIRCUIT DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER COURTS DECLARING UNCONSTITUTIONAL AND STRIKING DOWN LAWS BASED UPON THE MODEL DRUG PARAPHERNALIA ACT.

In the Petition at pages 5-9, the Merchants argue that the judgment of the Eighth Circuit is in direct conflict with decisions of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") and a large number of federal district and state courts. The State disputes this contention, arguing that (1) there exists no conflicting decision of the Sixth Circuit following this Court's vacation and remand of Record Revolution No. 6, Inc. v. City of Parma, Onio, 638

F.2d 916 (6th Cir. 1980), vacated and remanded only as to Case Nos. 80-3308 and 80-3352, 49 U.S.L.W. 3882 (May 26, 1981),[1] and (2) the decision of the Eighth Circuit is consistent with the trend of recent trial court cases. For the reasons discussed below, these arguments of the State are without merit.

A. The Judgment of the Sixth Circuit in The Right Place, Inc. v. City of North Olmsted, Ohio Is Final and Governs the Sixth Circuit.

The State overlooks the fact that The Right Place, Inc. v. City of North Olmsted, Ohio, 638 F.2d 916 (6th Cir.

1/ This Court vacated and remanded two consolidated cases, Record Revolution No. 6, Inc. v. City of Parma, Ohio, No. 80-3308, and Alexander J. Luka d/b/a Daystar Boutique v. City of Lakewood, Ohio, No. 80-3352, for consideration of a single issue of state law which arose following entry of the judgment of the Sixth Circuit. 49 U.S.L.W. 3882 (May 26, 1981). That issue has been fully briefed and argued before the Sixth Circuit and awaits decision.

1980), one of the three cases consolidated on appeal before the Sixth Circuit (No. 80-3353), was not appealed to this Court. Accordingly, the Sixth Circuit's opinion in that case became final and will stand as the law governing the Sixth Circuit regardless of any decision by the Sixth Circuit in Record Revolution No. 6, Inc. See Federated Department Stores, Inc. v. Moitie, 49 U.S.L.W. 4687 (No. 79-1517 June 15, 1981).2/

2/ This Court in Federated Department Stores, Inc. refused to permit relitigation of unappealed adverse judgments despite the reversal of identical judgments in related cases, holding that "the res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principal subsequently overruled in another case." 49 U.S.L.W. at 4689. There is "no general equitable doctrine . . . which countenances an exception to the finality of a party's failure to appeal merely because his rights are 'closely interwoven' with those of another party." Id.

The Merchants set forth in the Petition at pages 6-8 a number of areas of direct conflict between the decisions of the Sixth and Eighth Circuits, and the State has not disputed any of those arguments. Only a decision by this Court can resolve the conflict between the Sixth and Eighth Circuits.

B. The Decision of the Eighth Circuit Is in Direct Conflict with the Trend of Recent Federal District and State Court Decisions.

The State argues in its Opposition at page 4 that, "There is a developing consensus of opinion at the trial court level finding statutes based upon the Model Act to be constitutional." That statement is only partially correct. There is a developing consensus of opinion at the trial court level; the consensus, however, is that laws based upon the Model Act are unconstitutional.

Of the trial court cases relied upon by the State in support of its argument,[3] only two were decided after the decision of the Sixth Circuit in Record Revolution. The opinion in Nova Records, Inc. v. Sendak, 504 F. Supp. 938 (S.D. Ind. 1980), appeal docketed, No. 81-1107 (7th Cir. Jan. 22, 1981), was filed only one day after the decision was filed in Record Revolution. Therefore, the court in Nova Records, Inc. was without the benefit of the Sixth Circuit's opinion. Moreover, the Indiana law at issue in that case is significantly different from the Model Act and the Nebraska Law in a number of material respects.[4] The only other

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3/ Opposition at 4 nn.1 & 2.

4/ For instance, the definition of "drug paraphernalia" in the Indiana law expressly refers to the intent of the accused and includes only items to be used "primarily" in drug-related activities. Additionally, the offense provisions of the Indiana law do not contain a negligence standard.

trial court case cited by the State which was decided after the Sixth Circuit rendered its opinion in Record Revolution is The General Store, Inc. v. Bingaman, No. CIV 81-0330-C (D.N.M. June 12, 1981), appeal docketed, No. 81-1681 (10th Cir. June 23, 1981). The judgment in that case is not accompanied by an opinion.[5/]

On the other hand, there are a large number of courts which, presented with challenges to "drug paraphernalia" laws

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5/ The General Store, Inc. v. Bingaman, No. CIV 81-0330-C (D.N.M. June 12, 1981) (Campos, J.), is in direct conflict with two other decisions by other judges of the United States District Court for the District of New Mexico. Weiler v. Carpenter, 507 F. Supp. 837 (D.N.M. 1981) (Burciaga, J.), and General Stores, Inc. v. City of Albuquerque, No. 81-0027-M (D.N.M. March 23, 1981) (Mechem, J.), declared unconstitutional and struck down laws based upon the Model Act. There are well-reasoned opinions accompanying the judgments in Weiler v. Carpenter and General Stores, Inc. v. City of Albuquerque.

based upon the Model Act, followed the precedent of the Sixth Circuit in striking down the laws. Those cases are cited in the Merchants' Petition at pages 8-9 and need not be repeated herein.

II. THE NEBRASKA LAW WAS BASED UPON, AND IS VIRTUALLY IDENTICAL TO, THE MODEL ACT.

The Merchants have asserted that resolution of the questions presented by the Petition will have nationwide impact since the Nebraska Law is virtually identical to the Model Act, which has been enacted by numerous governmental units across the country. The State has disputed this contention in its Opposition at pages 5-6 by attempting to distinguish the Nebraska Law from the Model Act. The distinctions noted by the State, however, are insignificant as they relate to the constitutional infirmities of the Model Act and the Nebraska Law.

The State raises only two differences between the Nebraska Law and the Model Act.[6] First, the State notes that the definition of "drug paraphernalia" in the Nebraska Law omits reference to the propagation and harvesting of drugs.[7] Compare Nebraska Law Section 1 (Petition App. at A53) with Model Act Article I (Petition App. at 499). The Nebraska Law defines "drug paraphernalia" as:

> all equipment, products, and materials of any kind which are used, intended for use, or designed for use, in manufacturing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance . . . .

6/ Opposition at 1-2.

7/ See The Casbah, Inc. v. Thone, Nos. 80-1925 & 80-2033, slip op. at 4 n.4 (8th Cir. June 8, 1981) (Petition for Certiorari, Appendix at A4 ("Petition App.")) ("Slip Op.").

In view of the potentially limitless range of items which may be used to "introduce into the human body a controlled substance,"[8/] omission of items pertaining to the propagation and harvesting of drugs does not materially narrow the definition of "drug paraphernalia."

Second, the State points out that the list in the Nebraska Law of examples of items which may be used in conjunction with controlled substances is shorter than the list of such items in the Model Act. Compare Nebraska Law Section 1 (1)-(3) (Petition App. at A53-54) with Model Act Article I (Petition App. at A99-101). However, the omission of several examples of items which might be "drug paraphernalia" from a list which is expressly non-all-inclusive does not limit the definition of "drug paraphernalia."

8/ Petition App. at A34.

The Court of Appeals for the Eighth Circuit correctly found that neither of these distinctions between the Nebraska Law and the Model Act was significant.[9/] The Nebraska Law is identical to the Model Act in all material respects and, therefore, resolution by this Court of issues pertaining to the constitutionality of the Nebraska Law will have nationwide implications.

III. THE DECISION OF THE EIGHTH CIRCUIT IS CLEARLY IN ERROR AND SHOULD BE REVERSED.

For the reasons presented in the Petition at pages 11-29, the decision of the Eighth Circuit is in error.[10/] The Merchants will not repeat herein those

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9/ Slip Op. at 4 n.4 (Petition App. at A4).

10/ See Note, The Constitutionality of Drug Paraphernalia Laws, 81 Colum. L. Rev. 518 (1981).

reasons but will only respond to two issues raised by the State's Opposition.

First, the State has misread the Nebraska Law, arguing at page 6 of its Opposition that the definition of "drug paraphernalia" is not unconstitutionally vague and overbroad because it "refers specifically to the defendant charged and not to some third party." The State, however, has not provided this Court with any citation to support that argument. The Merchants submit that the State cannot provide such support because the position of the State is erroneous.

The definition of "drug paraphernalia" as adopted by the Nebraska legislature contains no such reference to the accused. See Petition at 14-18. The Eighth Circuit recognized that omission and that without such a reference the Nebraska Law is unconstitutional. Rather

than declare the Nebraska Law unconstitutional, however, the Eighth Circuit improperly usurped the legislative function by revising the definition of "drug paraphernalia" so as constructively to add that reference. Petition at 11-13.

Second, the Merchants argued in their Petition that the offense provisions of the Nebraska Law violate due process by setting a negligence standard which requires the seller of virtually any item to guess, at his peril, at the intended or actual use to be made of an item by another individual. Petition at 18-19.

The State fails to address this issue in its Opposition. The State conveniently 'forgets' that a negligence standard exists in the Nebraska Law, preferring to recognize only the knowledge standard:

> The statute makes unlawful the use, possession, manufacture, delivery or advertisement of

> drug paraphernalia knowing that it is intended to be used in connection with drug abuse.

Opposition at 2 (emphasis added). Unfortunately, pretending that the Nebraska Law does not include a negligence standard does not make it so.

CONCLUSION

The judgment of the Eighth Circuit directly conflicts with the opinion of the United States Court of Appeals for the Sixth Circuit in The Right Place, Inc. v. City of North Olmsted, Ohio and with the trend of recent decisions of federal and state courts which have declared unconstitutional and struck down laws based upon the Model Drug Paraphernalia Act.

The Model Drug Paraphernalia Act and the Nebraska Law are identical in all material respects. Resolution by this Court of the questions presented herein

will have nationwide impact because a very large number of states and municipalities throughout the country have adopted similar laws based upon the Model Act.

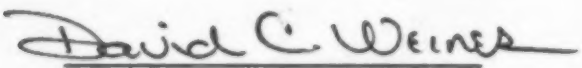
Although this Court has noted probable jurisdiction in The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, Illinois, 639 F.2d 373 (7th Cir.), prob. juris. noted, 101 S. Ct. 3028 (1981), that case has at issue a sui generis formulation unlike the Model Act. Therefore, a decision in Village of Hoffman Estates cannot resolve the important constitutional issues arising from the Model Act.[11/]

Finally, the opinion of the Eighth Circuit is plainly in error and should be reversed.

11/ Note, The Constitutionality of Drug Paraphernalia Laws, 81 Colum. L. Rev. 581, 586 n.34 (1981).

For the reasons discussed herein and in the Petition for Certiorari, this Court should grant the Merchants' Petition.

Respectfully submitted,



David C. Weiner,
Counsel of Record
Armond D. Budish

Hahn, Loeser Freedheim,
Dean & Wellman

800 National City E. 6th
Building
Cleveland, Ohio 44114
(216) 621-0150
Counsel for Petitioners

OF COUNSEL:

Donald B. Fiedler
300 Keeline Building
Omaha, Nebraska 68102

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 1981, three copies of Petitioners' Brief in Reply to Respondents' Opposition to Petition for Certiorari were served by regular mail, first-class postage prepaid, upon Paul L. Douglas, Attorney General of Nebraska, counsel for Respondents.

David C. Weiner
David C. Weiner
Counsel of Record for
Petitioners

Sworn to before me and subscribed in my presence this 7th day of December, 1981.

Notary Public
ARMOND D. BUDISH, Attorney At Law
Notary Public - State of Ohio
My commission has no expiration date.
Section 147.03 R. C.

Supplemental Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
FEB 18 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-415

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE CASBAH, INC., et al.,
Petitioners,

vs.

CHARLES THONE, et al.,
Respondents.

To the United States Court of Appeals
For the Eighth Circuit

SUPPLEMENTAL BRIEF IN REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID C. WEINER, Counsel of Record
ARMOND D. BUDISH
HAHN, LOESER, FREEDHEIM, DEAN & WELLMAN
800 National City E. 6th Bldg.
(216) 621-0150
Counsel for Petitioners

TABLE OF AUTHORITIES

Cases

Alexander J. Luka d/b/a Daystar Boutique v. City of Lakewood, Ohio, 638 F.2d 916 (6th Cir. 1980), vacated and remanded, 49 U.S.L.W. 3882 (No. 80-3352 May 26, 1981), reaffirmed, No. 80-3352 (Jan. 6, 1982).....

The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, Illinois, 639 F.2d 373 (7th Cir. 1981), prob. juris. noted, 49 U.S.L.W. 3893 (No. 80-1681 June 1, 1981).....

Record Revolution No. 6, Inc. v. City of Parma, Ohio, 638 F.2d 916 (6th Cir. 1980), vacated and remanded, 49 U.S.L.W. 3882 (No. 80-3308 May 26, 1981) reaffirmed, No. 80-3308 (Jan. 6, 1982).....

The Right Place, Inc. v. City of North Olmsted, Ohio, 638 F.2d 916 (6th Cir. 1980).....

No. 81 - 415

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

THE CASBAH, INC., et al.,

Petitioners,

v.

CHARLES THONE, et al.,

Respondents.

To the United States Court of Appeals

For The Eighth Circuit

BRIEF IN REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR CERTIORARI

Petitioners ("the Merchants") wish to bring to the attention of this Court, pursuant to Rule 22.6 of the Rules of the Supreme Court of the United States, a recent opinion of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") in the consolidated cases of Record Revolution No. 6, Inc. v. City of Parma, Ohio, No. 80-3308 ("Record Revolution") and Alexander J. Luka d/b/a Daystar Boutique v. City of Lakewood, Ohio, No. 80-3352 ("Luka"). The Sixth Circuit reaffirmed its prior opinion in those cases (638 F.2d 916) declaring unconstitutional and striking down municipal laws enacting the Model Drug Paraphernalia Act ("Model Act").

On December 8, 1980, the Sixth Circuit rendered judgment in three consolidated cases: Record Revolution, Luka, and

The Right Place, Inc. v. City of North Olmsted, Ohio, No. 80-3353 ("Right Place"). 638 F.2d 916 (6th Cir. 1980). Record Revolution and Luka were appealed to this Court and, on May 26, 1981, were vacated and remanded to the Sixth Circuit for consideration of a single issue of state law which arose following entry of the judgment of the Sixth Circuit. 49 U.S.L.W. 3882. Right Place was not appealed.

In their Brief in Opposition to Petition for Writ of Certiorari, the Respondents (the "State") argue the lack of any conflicting court of appeals decision with that of the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit"), pointing to this Court's vacation and remand of Record Revolution and Luka. The State overlooked the fact that Right Place was not appealed.

In any event, the Sixth Circuit has now reaffirmed its decision in Record Revolution and Luka, holding:

> [O]ur panel reaffirms the opinion previously entered in this cause since we are unable to perceive that the statute just quoted above makes any change of such significance as to alter the basic unconstitutionality of the model act ordinances which were in dispute. We therefore reaffirm and re-enter the opinion decided and filed by this Court December 8, 1980.

A copy of the January 6, 1982 Order of the Sixth Circuit is attached hereto as Appendix "A".

For this reason, there may be no question concerning the vitality of the decision of the Sixth Circuit and the existence of a direct conflict between the Sixth Circuit and Eighth Circuit concern-

ing the unconstitutionality of laws based upon the Model Act.[1/]

Respectfully submitted,

David C. Weiner

David C. Weiner,
Counsel of Record
Armond D. Budish

Hahn, Loeser,
Freedheim, Dean &
Wellman

800 National City
E. 6th Building
Cleveland, Ohio 44114
(216) 621-0150

Counsel for Petitioners

1/ As Petitioners have argued in their Petition for a Writ of Certiorari at 10, a decision by this Court in the pending case of The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, Illinois, 639 F.2d 373 (7th Cir. 1981), prob. juris. noted, 49 U.S.L.W. 3893 (No. 80-1681), involving a municipal licensing ordinance, cannot address the constitutional issues raised by laws based upon the Model Act.

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of February, 1982, three copies of Petitioners' Supplemental Brief in Reply to Respondents' Opposition to Petition for Certiorari were served by regular mail, first-class postage prepaid, upon Paul L. Douglas, Attorney General of Nebraska, counsel for Respondents.

David C. Weiner
Counsel of Record for
Petitioners

Sworn to before me and subscribed in my presence this ____ day of February, 1982.

Notary Public

APPENDIX A
80-3308
80-3352

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

JAN 6 1982

JOHN P. HEHMAN, Clerk

RECORD REVOLUTION NO. 6, Inc.
Plaintiff-Appellant
vs.
CITY OF PARMA, OHIO, et al.
Defendants-Appellees

ALEXANDER J. LUKA, d/b/a DAYSTAR BOUTIQUE
Plaintiff-Appellant
vs.
CITY OF LAKEWOOD, OHIO, et al.
Defendants-Appellees

O R D E R

Before: EDWARDS, Chief Judge, MARTIN and JONES, Circuit Judges.

Under date of May 26, 1981 the U.S. Supreme Court vacated the judgment previously entered in this court in this same case on December 8, 1980 which said judgment and opinion had declared certain ordinances of the cities involved to be unconstitutional. The remand order provided:

> ON CONSIDERATION WHEREOF, it is ordered by this Court that the judgment herein be, and it is hereby, vacated with costs, and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of the recently enacted Section 2925.14 of the Ohio Revised Code.

Subsequent to receipt of said remand, this court has considered Section 2925.14 of the Ohio Revised Code which provides in full as follows:

(A) As used in this section, "paraphernalia for the use of marihuana" means any instrument, device, article, or thing, whether or not of crude or extemporized manufacture or assembly, that is used or intended for use for any of the following:

(1) preparing marihuana for ingestion, inhalation, or other introduction into the human body;

(2) ingesting, inhaling, or otherwise introducing marihuana into the human body;

(3) enhancing the effect of marihuana upon the human body;

(4) testing the strength, effectiveness, or purity of marihuana.

(B) No person shall knowingly sell or offer to sell paraphernalia for the use of marihuana to any juvenile.

(C) The following are affirmative defenses to a charge under this section:

(1) The defendant is the parent, guardian, or custodian of the juvenile involved.

(2) The juvenile involved, at the time the paraphernalia for the use of marihuana was sold or offered for sale to him, was accompanied by his parent, guardian, or custodian who, with knowledge that the paraphernalia sold or offered for sale would be used or was intended for use for a purpose set forth in division (A)(1), (2), (3), or (4) of this section, consented to the paraphernalia for the use of marihuana being sold or offered for sale to the juvenile.

(3) The juvenile involved exhibited to the defendant or his agent or employee a draft card, driver's license, birth certificate, or other official or apparently official document purporting to show that the juvenile was eighteen years of age or older, and the person to whom the document was exhibited did not otherwise have reasonable cause to believe that the juvenile was under eighteen years of age.

(D) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapter 3719., 4715., 4729., 4731., or 4741. of the Revised Code.

(E) Whoever violates this section is guilty of selling paraphernalia for the use of marihuana to juveniles, a misdemeanor [sic] of the first degree.

After additional argument from the contesting parties in open court, our panel reaffirms the opinion previously entered in this cause since we are unable to perceive that the statute just quoted above makes any change of such significance as to alter the basic unconstitutionality of the model act ordinances which were in dispute. We therefore reaffirm and re-enter the opinion decided and filed by this court December 8, 1980.

ENTERED BY ORDER OF THE COURT

John F. Helsman
Clerk